15/pt. 800-end/991

code of federal regulations

Commerce and Foreign Trade

15

PART 800 TO END
Revised as of January 1, 1991

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PART 800 TO END

Revised as of January 1, 1991

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AS OF JANUARY 1, 1991

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To cite the regulations in this volume use title, part and section number. Thus, **15 CFR 801.1** *refers to title 15, part 801, section 1.*

Explanation

The Code of Federal Regulations is a codification of the general and permanent rules published in the Federal Register by the Executive departments and agencies of the Federal Government. The Code is divided into 50 titles which represent broad areas subject to Federal regulation. Each title is divided into chapters which usually bear the name of the issuing agency. Each chapter is further subdivided into parts covering specific regulatory areas.

ISSUE DATES

Each volume of the Code is revised at least once each calendar year and issued on a quarterly basis approximately as follows:

Title 1 through Title 16	as of January 1
Title 17 through Title 27	as of April 1
Title 28 through Title 41	as of July 1
Title 42 through Title 50	as of October 1

The appropriate revision date is printed on the cover of each volume.

LEGAL STATUS

The contents of the Federal Register are required to be judicially noticed (44 U.S.C. 1507). The Code of Federal Regulations is prima facie evidence of the text of the original documents (44 U.S.C. 1510).

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OMB CONTROL NUMBERS

The Paperwork Reduction Act of 1980 (Pub. L. 96-511) requires Federal agencies to display an OMB control number with their information collection request. Many agencies have begun publishing numerous OMB control numbers as amendments to existing regulations in the CFR. These OMB numbers are placed as close as possible to the applicable recordkeeping or reporting requirements.

OBSOLETE PROVISIONS

Provisions that become obsolete before the revision date stated on the cover of each volume are not carried. Code users may find the text of provisions in effect on a given date in the past by using the appropriate numerical list of sections affected. For the period before January 1, 1986, consult either the List of CFR Sections Affected, 1949-1963, 1964-1972, or 1973-1985, published in seven separate volumes. For the period beginning January 1, 1986, a "List of CFR Sections Affected" is published at the end of each CFR volume.

INCORPORATION BY REFERENCE

What is incorporation by reference? Incorporation by reference was established by statute and allows Federal agencies to meet the requirement to publish regulations in the Federal Register by referring to materials already published elsewhere. For an incorporation to be valid, the Director of the Federal Register must approve it. The legal effect of incorporation by reference is that the material is treated as if it were published in full in the Federal Register (5 U.S.C. 552(a)). This material, like any other properly issued regulation, has the force of law.

What is a proper incorporation by reference? The Director of the Federal Register will approve an incorporation by reference only when the requirements of 1 CFR part 51 are met. Some of the elements on which approval is based are:

(a) The incorporation will substantially reduce the volume of material published in the Federal Register.

(b) The matter incorporated is in fact available to the extent necessary to afford fairness and uniformity in the administrative process.

(c) The incorporating document is drafted and submitted for publication in accordance with 1 CFR part 51.

Properly approved incorporations by reference in this volume are listed in the Finding Aids at the end of this volume.

What if the material incorporated by reference cannot be found? If you have any problem locating or obtaining a copy of material listed in the Finding Aids of this volume as an approved incorporation by reference, please contact the agency that issued the regulation containing that incorporation. If, after contacting the agency, you find the material is not available, please notify the Director of the Federal Register, National Archives and Records Administration, Washington DC 20408, or call (202) 523-4534.

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A subject index to the Code of Federal Regulations is contained in a separate volume, revised annually as of January 1, entitled CFR Index and Finding Aids. This volume contains the Parallel Table of Statutory Authorities and Agency

Rules (Table I), and Acts Requiring Publication in the Federal Register (Table III). A list of CFR titles, chapters, and parts and an alphabetical list of agencies publishing in the CFR are also included in this volume.

An index to the text of "Title 3—The President" is carried within that volume.

The Federal Register Index is issued monthly in cumulative form. This index is based on a consolidation of the "Contents" entries in the daily Federal Register.

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REPUBLICATION OF MATERIAL

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For a summary, legal interpretation, or other explanation of any regulation in this volume, contact the issuing agency. Inquiries concerning editing procedures and reference assistance with respect to the Code of Federal Regulations may be addressed to the Director, Office of the Federal Register, National Archives and Records Administration, Washington, DC 20408 (telephone 202-523-3517). Sales are handled exclusively by the Superintendent of Documents, Government Printing Office, Washington, DC 20402 (telephone 202-783-3238).

MARTHA L. GIRARD,
Director,
Office of the Federal Register.

January 1, 1991.

THIS TITLE

Title 15—COMMERCE AND FOREIGN TRADE is composed of three volumes. The parts in these volumes are arranged in the following order: Parts 0–299, 300–799, and Part 800-End. The first volume containing Parts 0-299 is comprised of Subtitle A—Office of the Secretary of Commerce, Chapter I—Bureau of the Census, and Chapter II—National Institute of Standards and Technology. The second volume containing Parts 300–799 is comprised of Chapter III—International Trade Administration and Chapter IV—Foreign-Trade Zones Board. The third volume containing Part 800-End is comprised of Chapter VII—Bureau of Export Administration, Chapter VIII—Bureau of Economic Analysis, Chapter IX—National Oceanic and Atmospheric Administration, Chapter XII—United States Travel Service, Chapter XIII—East-West Foreign Trade Board, Chapter XIV—Minority Business Development Agency, Chapter XX—Office of the United States Trade Representative, and Chapter XXIII—National Telecommunications and Information Administration. The contents of these volumes represent all current regulations codified under this title of the CFR as of January 1, 1991.

A redesignation table appears in the Finding Aids section of the volume containing Parts 300–799.

For this volume Shell Fleming was Chief Editor. The Code of Federal Regulations publication program is under the direction of Richard L. Claypoole, assisted by Alomha S. Morris.

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Title 15—Commerce and Foreign Trade

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PART 801—SURVEY OF INTERNATIONAL TRADE IN SERVICES BETWEEN U.S. AND FOREIGN PERSONS

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801.2 Recordkeeping requirements.
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801.10 Rules and regulations for the BE-20, Benchmark Survey of Selected Services Transactions with Unaffiliated Foreign Persons—1986.

AUTHORITY: 5 U.S.C. 301; Pub. L. 94-472, 90 Stat. 2059, 22 U.S.C. 3101-3108, as amended by sec. 306 of Pub. L. 98-573; and E.O. 11961, as amended by E.O. 12518.

SOURCE: 51 FR 7772, Mar. 6, 1986, unless otherwise noted.

§ 801.1 Purpose.

The purpose of this part is to set forth the rules and regulations necessary to carry out the data collection program concerning international trade in services that is required by, or provided for in, the International Investment and Trade in Services Survey Act (Pub. L. 94-472, 90 Stat. 2059, 22 U.S.C. 3101 to 3108, as amended by section 306 of Pub. L. 98-573), hereafter "the Act." The overall purpose of the Act with respect to services trade is to provide comprehensive and reliable information pertaining to international trade in services, and to do so with the minimum burden on respondents and with no unnecessary duplication of effort. The data are needed for policymaking purposes, for conducting international negotiations on trade in services, and for improving the recording of services transactions in the U.S balance of payments accounts.

§ 801.2 Recordkeeping requirements.

In accordance with section 5(b)(1) of the Act (22 U.S.C 3104), persons subject to the jurisdiction of the United States shall maintain any information (including journals or other books of original entry, minute books, stock transfer records, lists of shareholders, or financial statements) which is essential for carrying out the surveys and studies provided for by the Act.

§ 801.3 General reporting requirements.

(a) In accordance with section 5(b)(2) of the Act (22 U.S.C. 3104) persons subject to the jurisdiction of the United States shall furnish, under oath, any report containing information which is determined to be necessary to carry out the surveys and studies provided for by the Act.

(b) Such reports may be required from any U.S. person, other than the U.S. Government, engaged in international trade in services. Specific reporting requirements for a given report form are set forth below and, in more detail, on the form itself.

§ 801.4 Response required.

Reports, as specified below, are required from all U.S. persons coming within the reporting requirements, whether or not they are contacted by BEA. In addition, any person BEA contacts by sending them report forms must respond in writing. The response must be made by the due date of the report, either by filing the properly completed report form or by certifying in writing on the form that the person has no international services transactions within the purview of the Act or the regulations contained herein. The latter requirement is necessary to ensure compliance with reporting requirements and efficient administration of the Act.

§ 801.5 Confidentiality.

Information collected pursuant to § 801.3 is confidential (see section 5(c) of the Act, 22 U.S.C. 3104).

(a) Access to this information shall be available only to officials and employees (including consultants and contractors and their employees) of agencies designated by the President to perform functions under the Act.

(b) Subject to paragraph (d) of this section, the President may authorize the exchange of information between agencies or officials designated to perform functions under the Act.

(c) Nothing in this part shall be construed to require any Federal agency to disclose information otherwise protected by law.

(d) This information shall be used solely for analytical or statistical purposes or for a proceeding under § 801.6.

(e) No official or employee (including consultants and contractors and their employees) shall publish or make available to any other person any information collected under the Act in such a manner that the person to whom the information relates can be specifically identified.

(f) Reports and copies of reports prepared pursuant to the Act are confidential and their submission or disclosure shall not be compelled by any person without the prior written permission of the person filing the report and the customer of such person where the information supplied it identifiable as being derived from the records of such customer.

§ 801.6 Penalties.

(a) Whoever fails to furnish any information required by the Act or by § 801.3, or to comply with any other rule, regulation, order or instruction promulgated under the Act, may be subject to a civil penalty not exceeding $10,000 in a proceeding brought in an appropriate United States court and to injunctive relief commanding such person to comply, or both (see section 6 (a) and (b) of the Act, 22 U.S.C. 3105).

(b) Whoever willfully fails to submit any information required by the Act or by § 801.3, or willfully violates any other rule, regulation, order or instruction promulgated under the Act, upon conviction, shall be fined not more than $10,000 and, if an individual, may be imprisoned for not more than one year, or both. Any officer, director, employee, or agent or any corporation who knowingly participates in such violation, upon conviction, may be punished by a like fine, imprisonment, or both (see section 6(c) of the Act, 22 U.S.C. 3105).

(c) Any person who willfully violates § 801.5 relating to confidentially, shall, upon conviction, be fined not more than $10,000, in addition to any other penalty imposed by law (see section 5(d) of the Act, 22 U.S.C. 3104).

§ 801.7 General definitions.

(a) "Services" means economic activities whose outputs are other than tangible goods. Such term includes, but is not limited to, banking, insurance, transportation, communications and data processing, retail and wholesale trade, advertising, accounting, construction, design, engineering, management consulting, real estate, professional services, entertainment, education, and health care.

(b) "United States," when used in a geographic sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and all territories and possessions of the United States.

(c) "Foreign," when used in a geographic sense, means that which is situated outside the United States or which belongs to or is characteristic of a country other than the United States.

(d) "Person" means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government sponsored agency).

(e) "United States person" means any person resident in the United States or subject to the jurisdiction of the United States.

(f) "Foreign person" means any person resident outside the United States or subject to the jurisdiction of a country other than the United States.

(g) "Business enterprise" means any organization, association, branch, or venture which exists for profitmaking purposes or to otherwise secure economic advantage, and any ownership of any real estate.

(h) "Unaffiliated foreign person" means, with respect to a given U.S. person, any foreign person that is not an "affiliated foreign person" as defined in paragraph (i) of this section.

(i) "Affiliated foreign person" means, with respect to a given U.S. person—

(1) A foreign affiliate of which the U.S. person is a U.S. parent; or

(2) The foreign parent or other member of the affiliated foreign group of which the U.S. person is a U.S. affiliate.

(j) "Parent" means a person of one country who directly or indirectly, owns or controls 10 per centum or more of the voting stock of an incorporated business enterprise, or an equivalent ownership interest in an unincorporated business enterprise, which is located outside that country.

(k) "Affiliate" means a business enterprise located in one country which is directly or indirectly owned or controlled by a person of another country to the extent of 10 per centum or more of its voting stock for an incorporated business or an equivalent interest for an unincorporated business, including a branch.

(l) "U.S. parent" means the U.S. person that has direct investment in a foreign business enterprise.

(m) "Foreign affiliate" means an affiliate located outside the United States in which a U.S. person has direct investment.

(n) "Foreign parent" means the foreign person, or the first person outside the United States in a foreign chain of ownership, which has direct investment in a U.S. business enterprise, including a branch.

(o) "U.S. affiliate" means an affiliate located in the United States in which a foreign person has a direct investment.

(p) "Affiliated foreign group" means—

(1) The foreign parent;

(2) Any foreign person, proceeding up the foreign parent's ownership chain, which owns more than 50 per centum of the person below it up to and including that person which is not owned more than 50 per centum by another foreign person; and

(3) Any foreign person, proceeding down the ownership chain(s) of each of these members, which is owned more than 50 per centum by the person above it.

§ 801.8 Miscellaneous.

(a) *Required information not available.* All reasonable efforts should be made to obtain information required for reporting. Every applicable question on each form or schedule should be answered. When only partial information is available, an appropriate indication should be given.

(b) *Estimates.* If actual figures are not available, estimates should be supplied and labeled as such. When a data item cannot be fully subdivided as required, a total and an estimated breakdown of the total should be supplied.

(c) *Specify.* When "specify" is included in certain data items, the type and dollar amount of the major items included must be given for at least the items mentioned in the line or column instruction.

(d) *Space on form insufficient.* When space on a form is insufficient to permit a full answer to any item, the required information should be submitted on supplementary sheets, appropriately labeled and referenced to the item of column number and the form.

(e) *Extensions.* Requests for an extension of a reporting deadline will not normally be granted. However, in a hardship case, a written request for an extension will be considered provided it is received at least 15 days prior to the due date of the report and enumerates substantive reasons necessitating the extension.

(f) *Number of copies.* A single original copy of each form or schedule shall be filed with the Bureau of Economic Analysis. This should be the copy with the address label if such a labeled copy has been provided. In addition, each respondent must retain a copy of its report to facilitate resolution of problems. Both copies are protected by law; see § 801.5.

(g) *Other.* Instructions concerning filing dates, where to send reports, and whom to contact concerning a given report are contained on each form.

§ 801.9 Reports required.

(a) *Benchmark surveys.* BE-20, Benchmark Survey of Selected Services Transactions with Unaffiliated Foreign Persons: Section 4(a)(4) of the

Act (22 U.S.C. 3103) provides that benchmark surveys of trade in services between U.S. and unaffiliated foreign persons be conducted, but not more frequently than every 5 years. The survey is referred to as the "BE-20." Specific reporting requirements, exemption levels, and the year of coverage of a given BE-20 survey may be found in § 801.10.

(b) *Annual surveys.* (1) BE-29, Foreign Ocean Carriers' Expenses in the United States:

(i) *Who must report.* A BE-29 report is required from U.S. agents on behalf of foreign ocean carriers transporting freight or passengers to or from the United States. U.S. agents are steamship agents and other persons representing foreign carriers in arranging ocean transportation of freight and cargo between U.S. and foreign ports and in arranging port services in the United States. Foreign carriers are foreign persons that own or operate ocean going vessels calling at U.S. ports, including VLCC tankers discharging petroleum offshore to pipelines and lighter vessels destined for U.S. ports. They include carriers who own or who operate their own or chartered (United States or foreign-flag) vessels. They also include foreign subsidiaries of U.S. companies operating their own or chartered vessels as carriers for their own accounts. Where the vessels under foreign registry are operated directly by a U.S. carrier for its own account, the operations of such vessels should be reported on Form BE-30, Ocean Freight Revenues and Foreign Expenses of United States Carriers. The Bureau of Economic Analysis may, in lieu of BE-29 reports required from foreign carriers' U.S. agents, accept consolidated reports from foreign governments covering the operations of their national shipping concerns when, in the Bureau's discretion, such consolidated reports would provide the required information. Where such reports are accepted, the individual reports from foreign carriers' U.S. agents will not be required.

(ii) *Exemption.* Any U.S. person otherwise required to report is exempted from reporting if the total number of port calls by foreign vessels handled in the reporting period is less than forty or total covered expenses are less than $250,000. For example, if an agent handled less than 40 port calls in a calendar year, the agent is exempted from reporting. If the agent handled 40 or more calls, the agent must report unless covered expenses for all foreign carriers handled by the agent were less than $250,000. The determination of whether a U.S. person is exempt may be based on the judgment of knowledgeable persons who can identify reportable transactions without conducting a detailed manual records search.

(2) BE-36, Foreign Airline Operators' Revenues and Expenses in the United States:

(i) *Who must report.* A BE-36 report is required from U.S. offices, agents, or other representatives of foreign airlines that are engaged in transporting passengers or freight and express to or from the United States. If the U.S. office, agent, or other representative does not have all the information required, it must obtain the additional information from the foreign airline operator.

(ii) *Exemption:* A U.S. person otherwise required to report is exempted from reporting if total covered revenues and total covered expenses incurred in the United States are each less than $500,000 in the reporting period. If either total covered revenues or total covered expenses are $500,000 or more in the reporting period, a report must be filed.

(3) BE-47, Annual Survey of Construction, Engineering, Architectural, and Mining Services Provided by U.S. Firms to Unaffiliated Foreign Persons:

(i) *Who must report.* Form BE-47 must be filed by each U.S. person (other than U.S. Government agencies) providing the following types of services on a contract, fee, or similar basis to unaffiliated persons on foreign projects: The services of general contractors in the fields of building construction and heavy construction; construction work by special trade contractors, such as the erection of structural steel for bridges and buildings and on-site electrical work; services of a professional nature in the fields of engineering, architecture, and land surveying; and mining services in the development and operation of mineral properties, including oil and gas field services.

(ii) *Exemption.* Any U.S. person otherwise required to report is exempted from reporting if, for all countries and all projects combined, the gross value of new contracts received and gross operating revenues are both less than $1,000,000. If *either* the gross value of new contracts received or gross operating revenues is $1,000,000 or more, then a report is required.

(4) BE-48, Annual Survey of Reinsurance and other Insurance Transactions by U.S. Insurance Companies with Foreign Persons:

(i) *Who must report.* Reports on Form BE-48 are required from U.S. persons who have engaged in reinsurance transactions with foreign persons, or who have received premiums from, or paid losses to, foreign persons in the capacity of primary insurers.

(ii) *Exemption.* A U.S. person otherwise required to report is exempted from reporting if, with respect to transactions with foreign persons, each of the following six items was less than $1,000,000 in the reporting period: Reinsurance premiums received, reinsurance premiums paid, reinsurance losses paid, reinsurance losses recovered, primary insurance premiums received, and primary insurance losses paid. If *any one* of these items is $1,000,000 or more in the reporting period, a report must be filed.

(5) BE-93, Annual Survey of Royalties, License Fees, and Other Receipts and Payments for Intangible Rights Between U.S. and Unaffiliated Foreign Persons:

(i) *Who must report.* Reports on Form BE-93 are required from U.S. persons who have entered into agreements with unaffiliated foreign persons to buy, sell, or use intangible assets or proprietary rights, excluding those copyrights and other intellectual property rights that are related to computer software, and excluding oil royalties and other natural resources (mining) royalties.

(ii) *Exemption.* A U.S. person otherwise required to report is exempt if total receipts and total payments of the types covered by the form are each less than $500,000 in the reporting year. If the total of *either* covered receipts or payments is $500,000 or more in the reporting year, a report must be filed.

(6) BE-22, Annual Survey of Selected Services Transactions with Unaffiliated Foreign Persons:

(i) *Who must report.* (A) Mandatory reporting—A BE-22 report is *required* from each U.S. person who had one or more individual sale or purchase transactions in excess of $250,000 with an unaffiliated foreign person in any of the covered services during the U.S. person's fiscal year. The determination of whether a U.S. person is subject to this mandatory reporting requirement may be judgmental, that is, based on the judgment of knowledgeable persons in a company who can identify reportable transactions on a recall basis, with a reasonable degree of certainty without conducting a detailed manual records search.

(B) Voluntary reporting—U.S. persons receiving a copy of the survey are *requested* to provide, for each of the covered services, estimates of sale or purchase transactions with an unaffiliated foreign person that are each $250,000 or less but for which the total value exceeds $500,000 during the U.S. person's fiscal year. Provision of this information is voluntary. The estimates may be judgmental, that is, based on recall, without conducting a detailed manual records search.

(C) Any U.S. person receiving a BE-22 survey form from BEA must complete the form and return it to BEA. A person that is not subject to the mandatory reporting requirement in paragraph (b)(6)(i)(A) of this section and/or is not filing information on a voluntary basis must complete the "Basis for not reporting data" and the "Certification." This requirement is necessary to ensure compliance with the reporting requirements and efficient administration of the survey by eliminating unnecessary followup contact.

(ii) *Covered services.* The services covered by this survey are the same as those covered by the BE-20, Benchmark Survey of Selected Services Transactions with Unaffiliated Foreign Persons—1986, as listed in § 801.10(d) of this Part, except that sales and purchases of prepackaged computer software are excluded.

(iii) *BE-22 definition of transaction.* (A) "Transaction" means, for purposes of this survey, the total value, as entered on the respondent's books, of services sold to or purchased from an unaffiliated foreign person during the respondent's fiscal year.

(B) Notwithstanding paragraph (b)(6)(iii)(A) of this section, in the following cases, a "transaction" is to be measured by an item other than sales or purchases in determining whether the thresholds for mandatory or voluntary reporting are exceeded:

(*1*) *Advertising.* Advertising agencies should use gross billings to unaffiliated foreign persons, including funds passed through to media companies and not included in the agency's income statement.

(*2*) *Telecommunications.* For jointly provided (basic) services, use receipts from foreign persons for messages or leased lines originating abroad, and payouts to foreign persons for messages or leased lines originating in the United States.

(*3*) *Performing arts, sports, and other live performances, presentations, and events.* Fees are defined net of allowances for expenses.

(*4*) *Employment agencies and temporary help supply services.* Receipts and payments should include any funds for compensation of workers carried on the payroll of the agency or supply service, as well as agency fees.

(c) *Quarterly surveys.* (1) BE-30, Ocean Freight Revenues and Foreign Expenses of United States Carriers:

(i) *Who must report.* A BE-30 report is required from U.S. carriers, i.e., from U.S. persons that own or operate dry cargo, passenger (including combination), and tanker vessels regardless of whether the vessels are registered in the United States or in foreign countries. Operators are persons who enter into any form of transportation contract with shippers of merchandise (or their agents) for the transportation of freight and cargo between U.S. and foreign ports or between foreign ports, whether on the operators' own vessels or chartered vessels.

(ii) *Exemption.* A U.S. person otherwise required to report is exempted from reporting if total annual covered revenues (i.e., revenues on outbound, cross-trade, and inbound cargoes and charter hire received) and total annual covered expenses (i.e., charter hire paid and expenses in foreign countries) are, or are expected to be, each less than $500,000. If either total annual covered revenues or total annual covered expenses are, or are expected to be, $500,000 or more, a report must be filed.

(2) BE-37, U.S. Airline Operators' Foreign Revenues and Expenses:

(i) *Who must report.* A BE-37 report is required from all U.S. airline operators engaged in transportation of passengers and freight to and from the United States or between foreign points.

(ii) *Exemption.* A U.S. person otherwise required to report is exempted from reporting if total annual covered revenues (i.e., revenues from carrying U.S. export freight to foreign countries) and total annual covered expenses (i.e., expenses incurred outside the United States and aircraft leasing expenses) are, or are expected to be, each less than $500,000. If either total annual covered revenues or total annual covered expenses are, or are expected to be, $500,000 or more, a report must be filed.

[51 FR 7772, Mar. 6, 1986, as amended at 52 FR 19843, May 28, 1987; 52 FR 46589, Dec. 9, 1987; 53 FR 39455, Oct. 7, 1988; 53 FR 41563, Oct. 24, 1988]

§ 801.10 Rules and regulations for the BE-20, Benchmark Survey of Selected Services Transactions with Unaffiliated Foreign Persons—1986.

A BE-20, Benchmark Survey of Selected Services Transactions with Unaffiliated Foreign Persons, will be conducted covering companies' 1986 fiscal year. All legal authorities, provisions, definitions, and requirements contained in §§ 801.1 through 801.9(a) are applicable to this survey. Additional rules and regulations for the BE-20 survey are given below. More detailed instructions are given on the report form itself.

(a) The BE-20 survey consists of two Parts and six Schedules, A-F. Part I (Name, Address, and Determination of

Reporting Status) requests information needed to determine whether a report is required and which schedules apply. Part II (Identification and Selected Financial and Operating Data of U.S. Reporter) requests information about the reporting entity. Each of the six schedules covers a different type or group of services and is to be completed only if the U.S. Reporter has transactions of the type(s) covered by the particular schedule.

(b) *Who is to report and transactions to be reported.* (1) Mandatory reporting—A BE-20 report is *required* from each U.S. person who has one or more individual sale *or* purchase transactions in excess of $250,000 with an unaffiliated foreign person in any of the services listed in paragraph (d) of this section during the U.S. person's 1986 fiscal year.

(i) The determination of whether a U.S. person is subject to this mandatory reporting requirement may be judgmental, that is, based on the judgment of knowledgeable persons in a company who can identify reportable transactions on a recall basis, with a reasonable degree of certainty without conducting a detailed manual records search.

(ii) Reporters who must file pursuant to this mandatory reporting requirement must complete Parts I and II of Form BE-20 and all applicable schedules. The total amounts of individual transactions exceeding $250,000 that are applicable to a particular schedule are to be entered in the appropriate column(s) on line 1, section A of the schedule. In addition, these amounts must be distributed below line 1 to the country(ies) involved in the transaction(s).

(2) Voluntary reporting—U.S. persons receiving a copy of the survey are *requested* to provide, for each of the services listed in paragraph (d) of this section, supplemental estimates of individual sale or purchase transactions with unaffiliated foreign persons that are $250,000 or less but for which the total value exceeds $500,000 during the U.S. person's 1986 fiscal year. These estimates are requested whether or not the U.S. Reporter also had activity to report under the mandatory reporting requirement in paragraph (b)(1) of this section.

(i) Provision of this information is voluntary. The estimates may be judgmental, that is, based on recall, without conducting a detailed manual records search.

(ii) The total amounts of transactions applicable to a particular schedule are to be entered in the appropriate column(s) on line 39, section B of the schedule; they are *not* to be disaggregated by country. Reporters filing voluntary information only and who have *no* individual transactions exceeding $250,000 should also complete Part I, section A, B, and C of Form BE-20, answering "no" for each type of service listed in Part I, Section B. They should not complete Part II of Form BE-20.

(3) Any U.S. person receiving the BE-20 survey form from BEA, even if the person is not subject to the mandatory reporting requirement in paragraph (b)(1) of this section and is not filing information on a voluntary basis pursuant to paragraph (b)(2) of this section, must nevertheless complete and return to BEA Part I of the form, answering "no" for each type of service listed in Part I, Section B, and indicating in Part I, section C that no voluntary data are being reported. This requirement is necessary to ensure compliance with reporting requirements and efficient administration of the Act by eliminating unnecessary followup contact.

(c) *BE-20 definition of transaction.* (1) For purposes of the BE-20 survey, a "transaction" is defined as the total value, as entered on the respondent's books, of services sold to or purchased from an unaffiliated foreign person during the respondent's 1986 fiscal year.

(2) Notwithstanding paragraph (c)(1), of this section, in the following cases, a "transaction" is to be measured by an item other than sales or purchases in determining whether the thresholds for mandatory or voluntary reporting are exceeded:

(i) Advertising: Advertising agencies should use gross billings to unaffiliated foreign persons, including funds passed through to media companies and not included in the agency's income statement.

(ii) Telecommunications: for jointly provided (basic) services, receipts from foreign persons for messages or leased lines originating abroad, and payouts to foreign persons for messages or leased lines originating in the United States, should be used.

(iii) Performing arts, sports, and other performances, presentations, and events: Fees are defined net of allowances for expenses.

(iv) Employment agencies and temporary help supply services: Receipts and payments should include any funds for compensation of workers carried on the payroll of the agency or supply service, as well as for agency fees.

(d) *Covered types of services.* Only the services listed below are covered by the BE-20 survey. Other services, such as transportation, reinsurance, lending and borrowing and related fees and charges, brokerage fees, royalties and license fees, etc., are NOT covered. Covered services are:

(1) Advertising services—Preparation of advertising and placement of such advertising in media, including charges for media space and time.

(2) Computer and data processing services—Data entry, processing (both batch and remote), and tabulation; computer systems analysis, design, and engineering; software, both custom programming and prepackaged, including rights to use, reproduce, or distribute such software; equipment leasing (except financial leasing); integrated hardware/software systems; and other computer services (e.g., timesharing, maintenance, and repair).

(3) Data base and other information services—Business and economic data base services, including business news, stock quotation, and financial information services; medical, legal, technical, demographic, bibliographic, and similar data base services; general news services, such as those purchased from a news syndicate; and other information services, including reservation systems and credit reporting and authorization systems.

(4) Telecommunications services. (i) Message telephone, telex, telegram, and other jointly provided (basic) services—Receipts from foreign persons (communications companies and postal, telephone, and telegraph agencies (PTT's)) for own share of revenues for transmitting messages originating abroad to U.S. destinations, and payouts to foreign persons (communications companies and PTT's) for their share of revenues for transmitting messages originating in the United States to foreign destinations. For messages originating in foreign countries and routed through the United States (for example, from Caribbean countries via the United States to Western Europe), includes receipts from the foreign person originating the message and payouts to the country of destination. Also includes receipts for transmitting messages between foreign points when not routed through the United States. Includes packet switched services when not offered in connection with enhanced services, and other regulated services of the type reportable to the FCC on Report 4361.

(ii) Private leased channel services—Receipts from foreign persons for circuits and channels terminating in the United States and for circuits and channels between foreign points, and payouts to foreign persons for leased channels and circuits terminating in foreign countries.

(iii) Value added (enhanced) services—Telecommunications services that add value or function above and beyond the telecommunications transport services that deliver the value-added services to end users. They can include electronic mail, voice mail, code and protocol processing, and management of data networks; facsimile services and videoconferencing; and other value-added (enhanced) services.

(iv) Support services—Services related to the maintenance and repair of telecommunications equipment; ground station services; capacity leasing for transiting; and launching of communications satellites.

(5) Agricultural services—Soil preparation services, crop services, veterinary and other animal services, farm labor and management services, and landscape and horticultural services.

(6) Research and development, and commercial testing, laboratory serv-

ices—Laboratory and other physical research and development and product testing. Excludes medical and dental laboratory services.

(7) Management, consulting, and public relations services—Management services, except management of health care facilities (see paragraph (d)(8) of this section); consulting services, except consulting engineering services related to actual or proposed construction or mining services projects (see paragraph (d)(18) of this section) and computer consulting (see paragraph (d)(2) of this section); and public relations services, except those that are an integral part of an advertising campaign (see paragraph (d)(1) of this section). Excludes management and operation of a foreign business by a U.S. person, or of a U.S. business by a foreign person, where operating staff as well as management is provided. (Generally, such operations would be deemed to constitute a foreign affiliate of the U.S. person, or a U.S. affiliate of the foreign person, to be reported in BEA's direct investment surveys, rather than in this survey.)

(8) Management of health care facilities—Management of hospitals, nursing homes, and other health care facilities. If operating staff is provided, generally should be reported in BEA's direct investment surveys, rather than in this survey.

(9) Accounting, auditing, and bookkeeping services, etc.—Excludes data processing and tabulating services (see paragraph (d)(2) of this section).

(10) Legal services—Legal advice or other legal services.

(11) Educational and training services—Educational or training services provided on a contract or fee basis. Excludes tuition and fees charged to individual foreign students U.S. educational institutions or to individual U.S. students by foreign educational institutions. Also excludes training done by a U.S. or foreign manufacturer in connection with the sale of a good (see paragraph (d)(15) of this section).

(12) Mailing, reproduction, and commerical art—Direct mail advertising services; blueprinting, photocopying, and other reproduction services, including those in connection with direct mail advertising; commercial photography, art, and graphic services; and stenographic services.

(13) Employment agencies and temporary help supply services—Employment services and provision of temporary help and personnel to perform services for others on a contract or fee basis. Where workers are carried on the payroll of the agency, includes receipts from or payments to unaffiliated foreign persons covering the compensation of workers, as well as agency fees.

(14) Industrial engineering services—Engineering services related to the design of movable products, including product design services. Excludes engineering and architectural services that relate to immovable products, such as those that relate to actual or proposes construction or mining services projects (see paragraph (d)(18) of this section). Excludes computer systems engineering (see paragraph (d)(2) of this section). (Includes, however, services performed with the assistance of computers, such as computer-assisted design work.)

(15) Industrial-type maintenance and repair, installation, and training services. (i) Maintenance and repair services primarily to machinery and equipment. May also include small maintenance and repair work on buildings, structures, dams, highways, etc., but only to the extent that the work is not covered under paragraph (d)(18) of this section). Would include such services as the periodic overhaul of turbines or locomotives, the extinguishing of natural gas well fires, and refinery maintenance. Excludes computer maintenance and repair services (see paragraph (d)(2) of this section).

(ii) Installation, startup, and training services provided by a manufacturer in connection with the sale of goods. Do not include such services where the cost is included in the price of the goods and not separately billed or is declared as a part of the price of the goods on the shippers export or import declaration filed with the U.S. Customs Service; however, services provided at a price over and above that entered on the shippers export or import declaration should be included. These services would be reported elsewhere if not provided in connection with the sale of goods. For example, installation of machinery and equipment is normally considered a construction activity, and training personnel in the use of new machinery would ordinarily be reported as an educational or training service. However, this separate category has been provided for reporting such services when provided in connection with goods.

(16) Performing arts, sports, and other live performers, presentations, and events—Fees (net of allowances for expenses) for performances abroad by U.S. or foreign performers, and for performances in the United States by foreign performers. To be reported by U.S. management companies, booking agents, promoters, and presenters who book performers and events abroad by U.S. or foreign performers; U.S. performers who received funds directly from a foreign person rather than through a U.S. management company (or similar entity); and management companies, booking agents, promoters, and presenters who book performances in the United States by foreign performers. (As used here, "performers" means entertainers, sports teams, orchestras, dance companies, lecturers, and similar persons or performing groups.)

(17) Direct insurance—Applies only to insurance *purchased* from unaffiliated foreign insurance carriers and includes premiums (net of cancellations) paid to these carriers. A U.S. Reporter should not report direct transactions with a foreign insurance company that is its foreign affiliate; such transactions are to be reported on direct investment survey Form BE-577. A U.S. Reporter should, however, report direct transactions with a foreign insurance company that is an affiliate of another U.S. company, as the U.S. Reporter and the foreign insurance company are unaffilliated. Note that the criterion for reporting is whether the transaction is between a U.S. and an unaffiliated foreign person. It is immaterial whether the assets insured are located in the United States or abroad. Excludes reinsurance transactions with insurance companies resident abroad. When insurance is purchased through a broker, the guidelines for reporting transactions carried out through an intermediary, which are contained in the *General Instructions* to the survey, should be followed.

(18) Construction, engineering, architectural, and mining services—Covers only *purchases* of the following types of services: Services of general contractors in the fields of building and heavy construction; construction work by special trade contractors, such as the erection of structural steel for bridges and buildings and on-site electrical work; architectural engineering, and land-surveying services; and mining services, including oil and gas field services. Includes only those engineering services purchased in conjunction with construction and mining services projects; industrial engineering services, such as product design services, should be included under paragraph (d)(14) of this section. Includes services purchased in connection with proposed projects (e.g., feasibility studies) as well as projects that are actually being carried out. Note that the U.S. Reporter's *Sales* of construction, engineering , architectural, and mining services are not reportable in this survey, but on separate Form BE-47.

[52 FR 19843, May 28, 1987]

PART 806—DIRECT INVESTMENT SURVEYS

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806.17 Rules and regulations for BE-12, Benchmark Survey of Foreign Direct Investment in the United States—1987.
806.18 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

AUTHORITY: 5 U.S.C. 301, 22 U.S.C. 3101-3108 and E.O. 11961, as amended.

SOURCE: 42 FR 64315, Dec. 22, 1977, unless otherwise noted.

§ 806.1 Purpose.

The purpose of this part is to set forth the rules and regulations necessary to carry out the data collection program and analyses concerning direct investment as required by, or provided for in, the International Investment Survey Act of 1976 (Pub. L. 94-472, 90 Stat. 2059, 22 U.S.C. 3101 to 3108), hereinafter "the Act". The overall purpose of the Act is to provide comprehensive and reliable information pertaining to international investment, including direct investment, and to do so with a minimum of burden on respondents and with no unnecessary duplication of effort.

§ 806.2 Recordkeeping requirements.

In accordance with section 5(b)(1) of the Act (22 U.S.C. 3104) persons subject to the jurisdiction of the United States shall maintain any information (including journals or other books of original entry, minute books, stock transfer records, lists of shareholders, or financial statements) which is essential for carrying out the surveys and studies provided for by the Act.

§ 806.3 Reporting requirements.

(a) In accordance with section 5 (b)(2) of the Act (22 U.S.C. 3104) persons subject to the jurisdiction of the United States shall furnish, under oath, any report containing information which is determined to be necessary to carry out the surveys and studies provided for by the Act.

(b) Such reports may be required from among others, U.S. persons which have direct investment abroad, U.S. persons in which foreign persons have direct investment, U.S. intermediaries, and U.S. persons which assist or intervene in the purchase or sale of direct investment interests, such as real estate brokers and brokerage houses acting as managers of tender offers.

§ 806.4 Response required.

Reports, as specified below, are required from all persons coming within the reporting requirements, whether or not they are contacted by BEA. In addition, any person BEA contacts, either by sending them report forms or buy written inquiry concerning the person's being subject to the reporting requirements of a survey conducted pursuant to this part must respond in writing. The reponse must be made by filing the properly completed report form, or by submitting in writing, or within 30 days of being contacted, a valid exemption claim (including the situation where the statistical data requested on the form are not applicable) or by certifying in writing to the fact that the person has no direct investments within the purview of the Act or the regulations contained herein. This requirement is necessary to ensure compliance with reporting requirements and efficient administration of the Act.

§ 806.5 Confidentiality.

Information collected pursuant to § 806.3 is confidential (see section 5(c) of the Act, 22 U.S.C. 3104).

(a) Access to this information shall be available only to officials and employees (including consultants and contractors and their employees) of agencies designated by the President to perform functions under the Act.

(b) Subject to paragraph (d) of this section, the President may authorize the exchange of information between agencies or officials designated to perform functions under the Act.

(c) Nothing in this part shall be construed to require any Federal Agency to disclose information otherwise protected by law.

(d) This information shall be used solely for analytical or statistical purposes or for a proceeding under § 806.6.

(e) No official or employee (including consultants and contractors and their employees) shall publish or make available to any other person any information collected under the Act in such a manner that the person to whom the information relates can be specifically identified.

(f) Reports and copies of reports prepared pursuant to the Act are confidential and their submission or disclosure shall not be compelled by any person without the prior written permission of the person filing the report and the customer of such person where the information supplied is identifiable as being derived from the records of such customer.

§ 806.6 Penalties.

(a) Whoever fails to furnish any information required by the Act or required by § 806.3 or to comply with any other rule, regulation, order or instruction promulgated under the Act may be subject to a civil penalty not exceeding $10,000 in a proceeding brought in an appropriate United States court and to injunctive relief commanding such person to comply, or both (see section 6(a) and (b) of the Act, 22 U.S.C. 3105).

(b) Whoever willfully fails to submit any information required by the Act or required by § 806.3 or willfully violates any other rule, regulation, order or instruction promulgated under the Act, upon conviction, shall be fined not more than $10,000 and, if an individual, may be imprisioned for not more than one year, or both. Any officer, director, employee, or agent of any corporation who knowingly participates in such violation, upon conviction, may be punished by a like fine, imprisonment, or both (see section 6(c) of the Act, 22 U.S.C. 3105).

(c) Any person who willfully violates § 806.5 relating to confidentiality, shall, upon conviction, be fined not more than $10,000, in addition to any other penalty imposed by law (see section 5(d) of the Act, 22 U.S.C. 3104).

§ 806.7 General definitions.

(a) *United States,* when used in a geographic sense, means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and all territories and possessions of the United States.

(b) *Foreign,* when used in a geographic sense, means that which is situated outside the United States or which belongs to or is characteristic of a country other than the United States;

(c) *Person* means any individual, branch, partnership, associated group, association, estate, trust, corporation, or other organization (whether or not organized under the laws of any State), and any government (including a foreign government, the United States Government, a State or local government, and any agency, corporation, financial institution, or other entity or instrumentality thereof, including a government sponsored agency);

(d) *United States person* means any person resident in the United States or subject to the jurisdiction of the United States;

(e) *Foreign person* means any person resident outside the United States or subject to the jurisdiction of a country other than the United States;

(f) *Business enterprise* means any organization, association, branch, or venture which exists for profitmaking purposes or to otherwise secure economic advantage, and any ownership of any real estate;

(g) *Parent* means a person of one country who, directly or indirectly, owns or controls 10 per centum or more of the voting stock of an incorporated business enterprise, or an equivalent ownership interest in an unincorporated business enterprise, which is located outside that country;

(h) *Affiliate* means a business enterprise located in one country which is directly or indirectly owned or controlled by a person of another country to the extent of 10 per centum or more of its voting stock for an incorporated business or an equivalent interest for an unincorporated business, including a branch;

(i) *International investment* means (1) the ownership or control, directly or indirectly, by contractual commitment or otherwise, by foreign persons of any interest in property in the United States, or of stock, other securities, or short- and long-term debt obligations of a United States person, and (2) the ownership or control, directly or indirectly, by contractual commitment or otherwise, by United States persons of any interest in property outside the United States, or of stock, other securities, or short- and long-term debt obligations of a foreign person;

(j) *Direct investment* means the ownership or control, directly or indirectly, by one person of 10 per centum or more of the voting securities of an incorporated business enterprise or an equivalent interest in an unincorporated business enterprise;

(k) *Portfolio investment* means any international investment which is not direct investment;

(l) *Associated group* means two or more persons who, by the appearance of their actions, by agreement, or by an understanding, exercise their voting privileges in a concerted manner to influence the management of a business enterprise. Each of the following are deemed to be an associated group:

(1) Members of the same family,

(2) A business enterprise and one or more of its officers and directors,

(3) Members of a syndicate or joint venture, or

(4) A corporation and its domestic subsidiaries;

(m) *Branch* means the operations or activities conducted by a person in a different location in its own name rather than through an incorporated entity; and

(n) *Intermediary* means an agent, nominee, manager, custodian, trust, or any person acting in a similar capacity.

[42 FR 64315, Dec. 22, 1977, as amended at 43 FR 54624, Nov. 22, 1978; 46 FR 23226, Apr. 24, 1981]

§ 806.8 Real estate.

Residential real estate held exclusively for personal use and not for profitmaking purposes is not subject to the reporting requirements of this part. A residence which was an owner's primary residence that is then leased by the owner while outside his/her country of usual residence but which the owner intends to reoccupy, is considered real estate held for personal use. Ownership of residential real estate by a corporation whose sole purpose is to hold the real estate and where the real estate is for the personal use of the individual owner(s) of the corporation, is considered real estate held for personal use. If a business enterprise, otherwise required to report, is in the form of real property not identifiable by name, reports are required to be filed by and in the name of the beneficial owner, or in the name of such beneficial owner by the intermediary of such beneficial owner.

[46 FR 23226, Apr. 24, 1981]

§ 806.9 Airlines and ship operators.

Foreign stations, ticket offices, and terminal and port facilities of U.S. airlines and ship operators; and U.S. stations, ticket offices, and terminal and port facilities of foreign airlines and ship operators; which provide services only to their own operations are exempted from being reported. Reports are required when such affiliates produce significant revenues from services provided to unaffiliated persons.

§ 806.10 Determining place of residence and country of jurisdiction of individuals.

An individual will be considered a resident of, and subject to the jurisdiction of, the country in which physically located, subject to the following qualifications:

(a) Individuals who reside, or expect to reside, outside their country of citizenship for less than one year are considered to be residents of their country of citizenship.

(b) Individuals who reside, or expect to reside, outside their country of citizenship for one year or more are considered to be residents of the country in which they are residing, except as provided in paragraph (c) of this section.

(c) Notwithstanding paragraph (b) of this section, if an owner or employee of a business enterprise resides outside the country of location of the enterprise for one year or more for the purpose of furthering the business of the enterprise, and the country of the business enterprise is the country of citizenship of the owner then such owner or employee shall nevertheless be considered a resident of the country of citizenship provided there is the intent to return within a reasonable period of time.

(d) Individuals and members of their immediate families who are residing outside their country of citizenship as a result of employment by the government of that country—diplomats, consular officials, members of the armed forces, etc.—are considered to be residents of their country of citizenship.

§ 806.11 Estates, trusts, and intermediaries.

(a) An estate, either U.S. or foreign, is a person and therefore may have direct investment, and the estate, not the beneficiary, is considered to be the owner.

(b) A trust, either U.S. or foreign, is a person, but is not a business enterprise. The trust shall be considered the same as an intermediary and reporting should be as outlined in paragraph (c) of this section. For reporting purposes, the beneficiary(ies) of the trust, or the creator(s) of the trust in the situation detailed below or if there is, or may be, a reversionary interest, shall be considered to be the owner(s) of the investments of the trust for determining the existence of direct investment. Where a corporation or other organization creates a trust designating its shareholders or members as beneficiaries, the creating corporation or organization shall be deemed to be the owner of the investments of the trust, or succeeding trusts where the presently existing trust has evolved out of a prior trust, for the purposes of determining the existence and reporting of direct investment.

This procedure is adopted in order to fulfill the statistical purposes of this part and does not imply that control over an enterprise owned or controlled by a trust is, or can be, exercised by the beneficiary(ies) or creator(s).

(c) Intermediary. (1) If a particular U.S. direct investment abroad is held, administered, or managed by a U.S. intermediary, such intermediary shall be responsible for reporting the required information for, and in the name of, its principal or shall instruct the principal to submit the required information. Upon instructing the principal, the intermediary shall be released from further liability to report provided it has informed this bureau of the date such instructions were given and the name and address of the principal, and has supplied the principal with any information in the possession of, or which can be secured by, the intermediary, that is necessary to permit the principal to complete the required reports. When acting in the capacity of an intermediary, the accounts or transactions of the U.S. intermediary with the foreign affiliate shall be considered as accounts or transactions of the U.S. principal with the foreign affiliate. To the extent such transactions or accounts are unavailable to the principal, they may be required to be reported by the intermediary.

(2) If a U.S. person holds a foreign affiliate through a foreign intermediary, the U.S. person will be considered to own the foreign affiliate directly and all accounts or transactions of the U.S. person with the intermediary will be considered to be with the foreign affiliate.

(3) If a particular foreign direct investment in the United States is held, exercised, administered, or managed by a U.S. intermediary for the foreign beneficial owner, such intermediary shall be responsible for reporting the required information for, and in the name of, the U.S. affiliate, and shall report on behalf of the U.S. affiliate or shall instruct the U.S. affiliate to submit the required information. Upon so instructing the U.S. affiliate, the intermediary shall be released from further liability to report provided it has informed this Bureau of the date such instructions were given and the name and address of the U.S. affiliate, and has supplied the U.S. affiliate with any information in the possession of, or which can be secured by, the intermediary that is necessary to permit the U.S. affiliate to complete the required reports. When acting in the capacity of an intermediary, the accounts or transactions of the U.S. intermediary with a foreign beneficial owner shall be considered as accounts or transactions of the U.S. affiliate with the foreign beneficial owner. To the extent such transactions or accounts are unavailable to the U.S. affiliate, they may be required to be reported by the intermediary.

(4) If a foreign beneficial owner holds a U.S. affiliate through a foreign intermediary, the U.S. affiliate may report the intermediary as its foreign parent but, when requested, must also identify and furnish information concerning the foreign beneficial owner, if known, or if such information can be secured. Accounts or transactions of the U.S. affiliate with the foreign intermediary shall be considered as accounts or transactions of the U.S. affiliate with the foreign beneficial owner.

[42 FR 64315, Dec. 22, 1977, as amended at 43 FR 54624, Nov. 22, 1978]

§ 806.12 Partnerships.

Limited partners do not have voting rights in a partnership and therefore cannot have a direct investment in a partnership; their investment is considered to be portfolio investment. Determination of the existence of direct investment in a partnership shall be based on the country of residence of, and the percentage control exercised by, the general partner(s), although the latter may differ from the financial interest of the general partners.

§ 806.13 Miscellaneous.

(a) *Accounting methods and records.* Generally accepted U.S. accounting principles should be followed. Corporations should generally use the same methods and records that are used to generate reports to stockholders, unless otherwise specified in the reporting instructions for a given report form. Reports for unincorporated persons must be generated on an equivalent basis.

(b) *Annual stockholder's report.* Business enterprises issuing annual reports to stockholders are requested to furnish a copy of their annual reports to this Bureau.

(c) *Required information not available.* All reasonable efforts should be made to obtain information required for reporting. Every question on each form should be answered, except where specifically exempted. When only partial information is available, an appropriate indication should be given.

(d) *Estimates.* If actual figures are not available, estimates should be supplied and labeled as such. When a data item cannot be fully subdivided as required, a total and an estimated breakdown of the total should be supplied.

(e) *Specify.* When "specify" is included in certain data items, the type and dollar amount of the major items included must be given for at least the items mentioned in the line instruction.

(f) *Space on form insufficient.* When space on a form is insufficient to permit a full answer to any item, the required information should be submitted on supplementary sheets, appropriately labeled and referenced to the item number and the form.

(g) *Extensions.* Requests for an extension of a reporting deadline will not normally be granted. However, in hardship cases, written requests for an extension will be considered provided they are received 15 days prior to the date of the report and enumerate substantive reasons necessitating the extension.

(h) *Number of copies.* A single original copy of each report shall be filed with the Bureau of Economic Analysis; this should be the copy with the address label if such a labeled copy has been provided. In addition, each respondent must retain a copy of its report. Both copies are protected by law; see § 806.5.

(i) *Other.* Instructions concerning filing dates, where to send reports, and whom to contact concerning a given report are contained on each form. General inquiries should be directed to the:

U.S. Department of Commerce, Bureau of Economic Analysis, International Investment Division (BE-50), Washington, DC 20230.

§ 806.14 U.S. direct investment abroad.

(a) *Specific definitions.* (1) "U.S. direct investment abroad" means the ownership or control, directly or indirectly, by one U.S. person of 10 per centum or more of the voting securities of an incorporated foreign business enterprise or an equivalent interest in an unincorporated foreign business enterprise, including a branch.

(2) *U.S. Reporter* means the U.S. person which has direct investment in

a foreign business enterprise, including a branch. If the U.S. person is an incorporated business enterprise, the U.S. Reporter is the fully consolidated U.S. domestic enterprise consisting of (i) the U.S. corporation whose voting securities are not owned more than 50 percent by another U.S. corporation, and (ii) proceeding down each ownership chain from that U.S. corporation, any U.S. corporation (including Domestic International Sales Corporations) whose voting securities are more than 50 percent owned by the U.S. corporation above it.

(3) *Foreign affiliate* means an affiliate located outside the United States in which a U.S. person has direct investment.

(4) *Majority-owned foreign affiliate* means a foreign affiliate in which the combined "direct investment interest" of all U.S. Reporters of the affiliate exceeds 50 per centum.

(b) *Foreign affiliate consolidation.* In cases where the recordkeeping system of foreign affiliates makes it impossible or extremely difficult to file a separate report for each foreign affiliate, a U.S. Reporter may consolidate affiliates in the same country when the following conditions apply:

(1) The affiliates are in the same BEA 3-digit industry as defined in the industry Classifications and Export and Import Trade Classifications Booklet; or

(2) The affiliates are integral parts of the same business operation. For example, if German affiliate A manufactures tires and a majority of its sales are to German affiliate B which produces autos, then affiliates A and B may be consolidated.

Any affiliates consolidated shall thereafter be considered to be one affiliate and should be consolidated in the same manner for all reports required to be filed pursuant to this section.

(c) *Reports required.* The place and time for filing, and specific instructions and definitions relating to, a given report form are given on the form. Reports are required even though a foreign affiliate may have been established, acquired, seized, liquidated, sold, expropriated, or inactivated during the reporting period.

(d) *Exemption levels.* Exemption levels for individual report forms will normally be stated in terms of total assets, net sales or gross operating revenues excluding sales taxes, and net income after income taxes, whether positive or negative, although different or special criteria may be specified for a given report form. If any one of the three items exceeds the exemption level and if the statistical data requested in the report are applicable to the entity being reported, then a report must be filed. Since these items may not have to be reported on a given form, a U.S. Reporter claiming exemption from filing a given form must furnish a certification as to the levels of the items on which the exemption is based or must certify that the data requested are not applicable. The exemption-level tests shall be applied as outlined below.

(1) For quarterly report forms, as to the assets test reports are required beginning with the quarter in which total assets exceed the exemption level; as to the test for sales (revenues) and net income after income taxes, reports are required for each quarter of a year in which the annual amount of these items exceeds or can be expected to exceed, the exemption level. Quarterly reports for a year may be required retroactively when it is determined that the exemption level has been exceeded.

(2) For report forms requesting annual data after the close of the year in question, the test shall be whether any one of the three items exceeded the exemption level during that year.

(3) For the semi-annual plant and equipment expenditures survey, which requests actual data for the past year and/or annual projections for the current and following year, the test will be made for each year as to whether any one of the three items exceeded, or is expected to exceed, the exemption level; data must be reported only for the year or years in which the exemption level is, or is expected to be, exceeded.

If total assets, sales or net income exceed the exemption level in a given year, it is deemed that the exemption level will also be exceeded in the following year.

The number and title of each report form, its exemption level, and other reporting criteria, if any, pertaining to it, are given below.

(e) *Quarterly report form.* BE-577—Transactions of U.S. Reporter with Foreign Affiliate: One report is required for each foreign affiliate exceeding an exemption level of $15,000,000 except that a report need not be filed by a U.S. Reporter to report direct transactions with one of its foreign affiliates in which it does not hold a direct equity interest unless an intercompany balance or fee and royalty receipts or payments for the quarter exceed $1,000,000.

(f) *Annual report forms.* (1) BE-133B—Follow-up Schedule of Expenditures for property, Plant, and Equipment of U.S. Direct Investment Abroad: This is a schedule-type report form on which each majority-owned foreign affiliate exceeding an exemption level of $10,000,000 must be listed and the requested data given for each.

(2) BE-133C—Schedule of Expenditures for Property, Plant, and Equipment of U.S. Direct Investment Abroad: This is a schedule-type report form on which each majority-owned foreign affiliate exceeding an exemption level of $10,000,000 must be listed and the requested data given for each.

(3) BE-11—Annual Survey of U.S. Direct Investment Abroad: A report, consisting of Forms BE-11A, BE-11B, and BE-11C, is required of each nonbank U.S. Reporter who, at the end of the Reporter's fiscal year, had a nonbank foreign affiliate reportable on Form BE-11B or BE-11C. Forms required and the criteria for reporting on each are as follows:

(i) A Form BE-11A (Report for U.S. Reporter) must be filed by each nonbank U.S person having a foreign affiliate reportable on Form BE-11B or BE-11C.

(ii) A Form BE-11B (Report for Majority-owned Foreign Affiliate) is required to be filed for each majority-owned nonbank foreign affiliate for which any *one* of the exemption level items exceeds $15,000,000.

(iii) A Form BE-11C (Report for Minority-owned Foreign Affiliate) must be filed for each minority-owned nonbank foreign affiliate that is owned at least 20 percent, but not more than 50 percent, directly or indirectly, by all U.S. Reporters of the affiliate combined, and for which any one of the exemption level items exceeds $15 million. In addition, for the report covering fiscal year 1992 only, a Form BE-11C must be filed for each minority-owned nonbank foreign affiliate that is owned, directly or indirectly, at least 10 percent by one U.S. Reporter, but less than 20 percent by all U.S. Reporters of the affiliate combined, and for which any one of the exemption level items exceeds $100 million.

(iv) Based on the preceding, an affiliate is exempt from being reported if it meets any one of the following criteria:

(A) None of its exemption level items is above $15 million.

(B) For fiscal year 1992 only, it is less than 20 percent owned, directly or indirectly, by all U.S. Reporters of the affiliate combined and none of its exemption level items exceeds $100 million.

(C) For fiscal years other than 1992, it is less than 20 percent owned, directly or indirectly, by all U.S. Reporters of the affiliate combined.

(D) Its U.S. parent (U.S. Reporter) is a bank.

(E) It is itself a bank.

(v) Notwithstanding the above, an affiliate holding an equity interest in another affiliate that must be reported on Form BE-11B or C must also be reported on Form BE-11B (if majority owned) or C (if minority owned), regardless of the value of its assets, sales, or net income. That is, all affiliates upward in the chain of ownership must be reported.

(g) *Other report forms.* (1) BE-507—Industry Classification Questionnaire: In general, U.S. Reporters and their foreign affiliates will each be assigned a BEA 3-digit industry code in the BE-10 Benchmark Surveys required by the Act to be conducted in 1982, 1989, and every fifth year thereafter. However, interim reports on Form BE-507 are required:

(i) For each foreign affiliate newly established or acquired by a U.S. person on or after January 1, 1978; or

(ii) For each U.S. person who becomes a U.S. Reporter on or after January 1, 1978 by virtue of establishing or acquiring a foreign affiliate; or

(iii) For an existing foreign affiliate or U.S. Reporter whose industry classification changes on or after January 1, 1978 so that a previous BE-507 report or the BE-10 report required to be filed for 1977 does not accurately reflect the current industry classification of the entity.

For new U.S. Reporters or foreign affiliates, the BE-507 report must be filed only if one of the other reports must be filed and shall be submitted with the initial filing of the related report. For a change in an existing U.S. Reporter or foreign affiliate which is currently filing one of the other reports, the BE-507 report must be filed whenever it is determined that change from one 3-digit industry classification to another has occurred.

(2) BE-10-Benchmark Survey of U.S. Direct Investment Abroad: Section 4(b) of the Act (22 U.S.C. 3103) provides that a comprehensive benchmark survey of U.S. direct investment abroad will be conducted in 1982, 1989, and every fifth year thereafter. The survey, referred to as the "BE-10," consists of a Form BE-10A or BE-10A BANK for reporting information concerning the U.S. Reporter and Form(s) BE-10B(LF), BE-10B(SF), or BE-10B BANK for reporting information concerning each foreign affiliate. Exemption levels, specific requirements for, and the year of coverage of, a given BE-10 survey may be found in § 806.16.

[42 FR 64315, Dec. 22, 1977; 43 FR 2169, Jan. 16, 1978, as amended at 46 FR 23226, Apr. 24, 1981; 47 FR 13139, Mar. 29, 1982; 48 FR 8993, Mar. 3, 1983; 49 FR 30059, July 26, 1984; 51 FR 11012, Apr. 1, 1986; 52 FR 8446, Mar. 18, 1987; 52 FR 42276, Nov. 4, 1987; 54 FR 51879, Dec. 19, 1989; 55 FR 49879, Dec. 3, 1990]

§ 806.15 Foreign direct investment in the United States.

(a) *Specific definitions.* (1) "Foreign direct investment in the United States" means the ownership or control, directly or indirectly, by one foreign person of 10 per centum or more of the voting securities of an incorporated U.S. business enterprise or an equivalent interest in an unincorporated U.S. business enterprise, including a branch.

(2) *U.S. affiliate* means an affiliate located in the United States in which a foreign person has a direct investment.

(3) *Foreign parent* means the foreign person, or the first person outside the United States in a foreign chain of ownership, which has direct investment in a U.S. business enterprise, including a branch.

(4) *Affiliated foreign group* means (i) the foreign parent, (ii) any foreign person, proceeding up the foreign parent's ownership chain, which owns more than 50 per centum of the person below it up to and including that person which is not owned more than 50 per centum by another foreign person, and (iii) any foreign person, proceeding down the ownership chain(s) of each of these members, which is owned more than 50 per centum by the person above it.

(5) *Foreign affiliate of foreign parent* means, with reference to a given U.S. affiliate, any member of the affiliated foreign group owning the affiliate that is not a foreign parent of the affiliate.

(6) *Ultimate beneficial owner* (*UBO*) is that person, proceeding up the ownership chain beginning with and including the foreign parent, that is not more than 50 percent owned or controlled by another person. (An owner who creates a trust, proxy, power of attorney, arrangement, or device with the purpose or effect of divesting such owner of the ownership of an equity interest as part of a plan or scheme to avoid reporting information, is deemed to be the owner of the equity interest.)

(b) *Beneficial, not record, ownership is the basis of the reporting criteria.* In those cases where a U.S. affiliate is also required to identify the ultimate beneficial owner (UBO) of the foreign investment, if the UBO is an individual, only the country of location of the individual must be given.

(c) *Bearer shares.* If the ownership in a U.S. affiliate by any owner in the ownership chain from the U.S. affiliate up to and including the ultimate beneficial owner (UBO) is represented by bearer shares, the requirement to disclose the information regarding the UBO remains with the reporting U.S. affiliate, except where a company in the ownership chain has publicly traded bearer shares. In that case, identification of the UBO may stop with the identification of the company whose capital stock is represented by the publicly traded bearer shares. For closely held companies with nonpublicly traded bearer shares, identifying the foreign parent or the UBO as "bearer shares" is not an acceptable response. The U.S. affiliate must pursue the identification of the UBO through managing directors or any other official or intermediary.

(d) *Aggregation of real estate investments.* A foreign person holding real estate investments that are foreign direct investments in the United States must aggregate all such holdings for the purpose of applying the exemption level tests. If the aggregate of such holdings exceeds one or more of the exemption levels, then the holdings must be reported even if they individually would be exempt.

(e) *Consolidated reporting by U.S. affiliates.* A U.S. affiliate shall file on a fully consolidated basis, including in the consolidation all other U.S. affiliates in which it directly or indirectly owns more than 50 per centum of the outstanding voting stock, unless the instructions for a given report form specifically provide otherwise. However, separate reports may be filed where a given U.S. affiliate is not normally consolidated due to unrelated operations or lack of control, provided written permission has been requested from and granted by BEA.

(f) The place and time for filing, and specific instructions and definitions relating to, a given report form will be given on the report form. Reports are required even though the foreign person's equity interest in the U.S. business enterprise may have been established, acquired, liquidated, or sold during the reporting period.

(g) *Exemption levels.* Exemption levels for individual report forms will normally be stated in terms of total assets, sales or gross operating revenues excluding sales taxes, and net income after income taxes, whether positive or negative, although different or special criteria may be specified for a given report form. If any one of the three items exceeds the exemption level and if the statistical data requested in the report are applicable to the entity being reported, then a report must be filed. Since these items may not have to be reported on a given form, a person claiming exemption from filing a given report form must furnish a certification as to the levels of the items on which the exemption is based or must certify that the data requested are not applicable. The exemption level tests shall be applied as outlined below.

(1) For quarterly report forms, as to the assets test, reports are required beginning with the quarter in which total assets exceed the exemption level; as to the test for sales (revenues) and net income after income taxes, reports are required for each quarter of a year in which the annual amount of these items exceeds or can be expected to exceed the exemption level. Quarterly reports for a year may be required retroactively when it is determined that the exemption level has been exceeded.

(2) For report forms requesting annual data after the close of the year in question, the test shall be whether any one of the three items exceeded the exemption level during that year.

If total assets, sales or net income exceed the exemption level in a given year, it is deemed that the exemption level will also be exceeded in the following year.

The number and title of each report form, its exemption level and other reporting criteria, if any, pertaining to it, are given below.

(h) *Quarterly report forms.* (1) BE-605—Transactions of U.S. Affiliate, Except on Unincorporated Bank, With Foreign Parent: One report is required for each U.S. affiliate exceeding an exemption level of $20,000,000.

(2) BE-606B—Transactions of U.S. Banking Branch or Agency with Foreign Parent: One report is required for each U.S. banking affiliate exceeding an exemption level of $20,000,000.

(i) *Annual report form.* BE-15—Annual Survey of Foreign Direct Investment in the United States: One report is required for each consolidated U.S. affiliate, except a bank, exceeding an exemption level of $10,000,000. A long form, Form BE-15(LF), must be filed by each nonbank U.S. affiliate for which at least one of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income after provision for U.S. income taxes—exceeds $20,000,000 (positive or negative); a short form, Form BE-15(SF), must be filed by each nonbank U.S. affiliate for which at least one of the three items exceeds $10,000,000 but no one item exceeds $20,000,000 (positive or negative). U.S. affiliates that are banks are exempt from the reporting requirements of this survey.

(j) *Other report forms.* (1) BE-607—Industry Classification Questionnaire: In general, a U.S. affiliate will be assigned a BEA 3-digit industry code in the BE-12 Benchmark Surveys required by the Act to be conducted in 1980, 1987, and every fifth year thereafter. However, interim reports on Form BE-607 are required:

(i) For each U.S. affiliate newly established or acquired by a foreign person; or

(ii) For an existing U.S. affiliate whose industry classification changes so that either a previous BE-607 report or the last BE-12 report required to be filed does not accurately reflect the current industry classification of the U.S. affiliate.

For new U.S. affiliates, the BE-607 report must be filed only if the affiliate must file one of the other reports and shall be submitted with the initial filing of the related report. For a change in an existing U.S. affiliate which is currently filing one of the other reports, the BE-607 report must be filed whenever it is determined that a change from one BEA 3-digit industry classification to another has occurred.

(2) BE-12—Benchmark Survey of Foreign Direct Investment in the United States: Section 4b of the Act (22 U.S.C. 3103) provides that a comprehensive benchmark survey of foreign direct investment in the United States shall be conducted in 1980, 1987, and every fifth year thereafter. The survey is referred to as the "BE-12". Exemption levels, specific requirements for, and the year of coverage of, a given BE-12 Survey may be found in § 806.17.

(3) BE-13—Initial Report on a Foreign Person's Direct or Indirect Acquisition, Establishment, or Purchase of the Operating Assets, of a U.S. Business Enterprise, Including Real Estate. This report is to be filed either:

(i) By a U.S. business enterprise when a foreign person establishes or acquires directly, or indirectly through an existing U.S. affiliate, a 10 percent or more voting interest in that enterprise, including an enterprise that results from the direct or indirect acquisition by a foreign person of a business segment or operating unit of an existing U.S. business enterprise that is then organized as a separate legal entity; or

(ii) By the existing U.S. affiliate of a foreign person when it acquires a U.S. business enterprise, or a business segment or operating unit of a U.S. business enterprise, that the existing U.S. affiliate merges into its own operations rather than continuing or organizing as a separate legal entity.

A separate report must be filed for each foreign parent or existing U.S. affiliate that is a party to the transaction.

EXCLUSIONS AND EXEMPTIONS

(a) Residential real estate held exclusively for personal use and not for profitmaking purposes is not subject to the reporting requirements. A residence which is an owner's primary residence that is then leased by the owner while outside the United States but which the owner intends to reoccupy, is considered real estate held for personal use. Ownership of residential real estate by a corporation whose sole purpose is to hold the real estate and where the real estate is for the personal use of the individual owner(s) of the corporation, is considered real estate held for personal use.

(b) An existing U.S. affiliate is exempt from reporting the acquisition of either a U.S. business enterprise, or a business segment or operating unit of a U.S. business enterprise, that it then merges into its own operations, if the total cost of the acquisition was $1,000,000 or less and does not involve the purchase of 200 acres or more of

U.S. land. (If the acquisition involves the purchase of 200 acres or more of U.S. land, it must be reported regardless of the total cost of the acquisition.)

(c) An established or acquired U.S. business enterprise, as consolidated, is exempt if its total assets (not the foreign parent's or existing U.S. affiliate's share) at the time of acquisition or immediately after being established were $1,000,000 or less and it does not own 200 acres or more of U.S. land. (If it owns 200 acres or more of U.S. land, it must report regardless of the value of total assets.)

If exempt under (b) or (c), the existing U.S. affiliate or the established or acquired U.S. business enterprise must, nevertheless, file an "Exemption Claim, Form BE-13" to validate the exemption.

(4) Form BE-14—Report by a U.S. Person Who Assists or Intervenes in the Acquisition of a U.S. Business Enterprise by, or Who Enters into a Joint Venture With, a Foreign Person—to be completed either by:

(i) A U.S. person—including, but not limited to, an intermediary, a real estate broker, business broker, and a brokerage house—who assists or intervenes in the sale to, or purchase by, a foreign person or a U.S. affiliate of a foreign person, of a 10 percent or more voting interest in a U.S. business enterprise, including real estate; or

(ii) A U.S. person who enters into a joint venture with a foreign person to create a U.S. business enterprise.

A U.S. person is required to report only when such a foreign involvement is known; it is not incumbent upon the U.S. person to ascertain the foreign status of a person involved in an acquisition unless the U.S. person has reason to believe the acquiring party may be a foreign person. If a U.S. person required to file a Form BE-14 files Form BE-13 relating to the acquisition of the U.S. business enterprise by a foreign person, then Form BE-14 is not required.

Total Exemptions—(a) Residential real estate held exclusively for personal use and not for profitmaking purposes is not subject to the reporting requirements. A residence which is an owner's primary residence that is then leased by the owner while outside the United States but which the owner intends to reoccupy, is considered real estate held for personal use. Ownership of residential real estate by a corporation whose sole purpose is to hold the real estate and where the real estate is for the personal use of the individual owner(s) of the corporation, is considered real estate for personal use.

(b) If the U.S. business enterprise acquired has total assets of, or if the capitalization (including loans from the joint venturers) of the joint venture to be established is, $1,000,000 or less, than no report is required, provided the enterprise does not own 200 acres or more of U.S. land. (If it owns 200 acres or more of U.S. land, a report is required regardless of the value of total assets.)

(5) BE-21—Survey of Foreign Direct Investment in U.S. Business Enterprises Engaged in the Processing, Packaging, or Wholesale Distribution of Fish or Seafoods. Reporting consists of:

(i) Form BE-21P—Identification Questionnaire. A completed questionnaire is required from (*a*) each U.S. business enterprise that is a U.S. affiliate of a foreign person and that engaged in the processing, packaging, or wholesale distribution of fish or seafoods, and (*b*) any person to whom a questionnaire is sent by BEA.

(ii) Form BE-21A—Report for a U.S. Business Enterprise that is a U.S. Affiliate of a Foreign Person. A completed report is required from each U.S. business enterprise that is a U.S. affiliate of a foreign person and that engaged in the processing, packaging, or wholesale distribution of fish or seafoods.

(iii) Form BE-21B—Report for each Establishment of a U.S. Business Enterprise that is a U.S. Affiliate of a Foreign Person. A completed report is required for each establishment, of the U.S. affiliate, that engaged in the processing, packaging, or wholesale distribution of fish or seafoods.

[42 FR 64315, Dec. 22, 1977; 43 FR 2169, Jan. 16, 1978, as amended at 44 FR 32586, June 6, 1979; 46 FR 23226, Apr. 24, 1981; 46 FR 60191, Dec. 9, 1981; 47 FR 13139, Mar. 29, 1982; 47 FR 14138, Apr. 2, 1982; 49 FR 3174, Jan. 26, 1984; 52 FR 8446, Mar. 18, 1987; 53 FR 1016, Jan. 15, 1988; 53 FR 15198, Apr. 28, 1988; 54 FR 1352, Jan. 13, 1989]

§ 806.16 Rules and regulations for BE-10, Benchmark Survey of U.S. Direct Investment Abroad-1989.

A BE-10, Benchmark Survey of U.S. Direct Investment Abroad will be conducted covering 1989. All legal authorities, provisions, definitions, and requirements contained in §§ 806.1 through 806.13 and § 806.14(a) through (d) are applicable to this survey. Specific additional rules and regulations for the BE-10 survey are given below.

(a) *Response required.* Section 806.4 requires that all persons subject to the reporting requirements, contained herein, of the BE-10, Benchmark Survey of U.S. Direct Investment Abroad—1989, respond, whether or not they are contacted by BEA. It also requires that a person, or their agent, who is contacted by BEA about reporting in this survey, either by sending them report forms or by written inquiry, must respond in writing. They may respond by:

(1) Certifying in writing, within 30 days of being contacted by BEA, to the fact that the person had no direct investment within the purview of the reporting requirements of the BE-10 survey;

(2) Completing and returning the "BE-10 Claim for Not Filing" within 30 days of receipt of the BE-10 survey report forms; or

(3) Filing the properly completed BE-10 report by May 31, 1990, or June 29, 1990, as required.

(b) *Who must report.* (1) A BE-10 report is required of any U.S. person that had a foreign affiliate—that is, that had direct or indirect ownership or control of at least 10 percent of the voting stock of an incorporated foreign business enterprise, or an equivalent interest in an unincorporated foreign business enterprise—at *any* time during the U.S. person's 1989 fiscal year.

(2) If the U.S. person had *no* foreign affiliates during its 1989 fiscal year, a "BE-10 Claim for Not Filing" must be filed within 30 days of receipt of the BE-10 survey package. No other forms in the survey are required. If the U.S. person had *any* foreign affiliates during its 1989 fiscal year, a BE-10 report is required and the U.S. person is a U.S. Reporter in this survey.

(3) Reports are required even though the foreign business enterprise was established, acquired, seized, liquidated, sold, expropriated, or inactivated during the U.S. person's 1989 fiscal year.

(c) *Forms for nonbank U.S. Reporters and foreign affiliates.* (1) Form BE-10A (Report for the U.S. Reporter)—A BE-10A report must be completed by a U.S. Reporter that is not a bank.

NOTE: If the U.S. Reporter is a corporation, Form BE-10A is required to cover the fully consolidated U.S. domestic business enterprise.

(i) If a nonbank U.S. Reporter had *any* foreign affiliates at any time during its 1989 fiscal year, whether held directly or indirectly, for which *any one* of the three items—total assets, sales or gross operating revenues excluding sales taxes, or income (or loss) after provision for U.S. income taxes—was *outside* the range of negative $3 million to positive $3 million, the U.S. Reporter must file a complete Form BE-10A and, as applicable, a BE-10A SUPPLEMENT listing each, if any, exempt foreign affiliate. It must also file a Form BE-10B(LF), BE-10B(SF), or BE-10B, BANK, as appropriate, for *each* nonexempt foreign affiliate.

(ii) If a nonbank U.S. Reporter had *no* foreign affiliates for which any of the three items listed in paragraph (c)(1)(i) of this section was *outside* the range of negative $3 million to positive $3 million, then only items 1-4 of Form BE-10A and the BE-10A SUPPLEMENT, listing all exempt foreign affiliates, must be completed.

(2) Form BE-10B(LF) or (SF) (Report for foreign affiliate).

(i) A BE-10B(LF) (Long Form) must be filed for each nonbank foreign affiliate of a nonbank U.S. Reporter, whether held directly or indirectly, for which *any one* of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income (loss) after provision for local income taxes—was *outside* the range of negative $15 million to positive $15 million.

(ii) A BE-10B(SF) (Short Form) must be filed

(A) For each nonbank foreign affiliate of a nonbank U.S. Reporter, whether held directly or indirectly, for which *any one* of the three items listed in (c)(2)(i) of this section was *outside* the range of negative $3 million to positive $3 million but for which all of these items were *within* the range of negative $15 million to positive $15 million and

(B) For each nonbank foreign affiliate of a U.S. bank Reporter for which *any one* of the three items listed in (c)(2)(i) of this section was *outside* the range of negative $3 million to positive $3 million.

(iii) Notwithstanding (c)(2)(i) and (c)(2)(ii) of this section, a Form BE-10B (LF) or (SF) must be filed for a foreign affiliate of the U.S. Reporter that owns another nonexempt foreign affiliate of that U.S. Reporter, even if the foreign affiliate parent is otherwise exempt, i.e., a Form BE-10B (LF) or (SF) must be filed for all affiliates upward in a chain of ownership.

(d) *Forms for U.S. Reporters and foreign affiliates that are banks or bank holding companies.* (1) For purposes of the BE-10 survey, "bank" means a business entity engaged in deposit banking, an Edge Act corporation engaged in international of foreign banking, a foreign branch or agency of a U.S. bank whether or not it accepts deposits abroad, and a bank holding company, i.e., a holding company for which over 50 percent of its total revenues is from banks which it holds. If the bank or bank holding company is part of a consolidated business enterprise and the gross operating revenues from nonbanking activities of this consolidated entity are more than 50 percent of its total revenues, then the consolidated entity is deemed *not* to be a bank even if banking revenues make up the largest single source of all revenues. (Activities of subsidiaries of a bank or bank holding company that may not be banks but that provide support to the bank parent company, such as real estate subsidiaries set up to hold the office buildings occupied by the bank parent company, are considered bank activities.)

(2) Form BE-10A Bank, (Report for a U.S. Reporter that is a bank). A BE-10A Bank, report must be completed by a U.S. Reporter that is a bank. Note: For purposes of filing Form BE-10A Bank, the U.S. Reporter is deemed to be the fully consolidated U.S. domestic business enterprise and all required data on the form shall be for the fully consolidated domestic entity.

(i) If a U.S. bank had *any* foreign affiliates at any time during its 1989 fiscal year, whether a bank or nonbank and whether held directly or indirectly, for which *any one* of the three items—total assets, sales or gross operating revenues excluding sales taxes, or not income (loss) after provision for local income taxes—was *outside* the range of negative $3 million to positive $3 million, the U.S. Reporter must file a complete Form BE 10A Bank and, as applicable, a BE-10A Bank Supplement listing each, if any, exempt foreign affiliate, whether bank or nonbank. It must also file a Form BE-10B(SF) for *each* nonexempt nonbank foreign affiliate and a Form BE-10B Bank for *each* nonexempt foreign bank affiliate.

(ii) If the U.S. bank Reporter had *no* foreign affiliates for which *any one* of the three items listed in paragraph (d)(2)(i) of this section was *outside* the range of negative $3 million and positive $3 million, then only items 1-4 of Form BE-10A Bank and the BE-10A Bank Supplement, listing all exempt foreign affiliates, should be completed.

(3) Form BE-10B Bank (Report for a foreign affiliate that is a bank).

(i) A BE-10B Bank report must be filed for each foreign bank affiliate of a bank or nonbank U.S. Reporter, whether directly or indirectly held, for which *any one* of the three items—total assets, sales or gross operating revenues excluding sales taxes, or net income (loss) after provision for local income taxes—was *outside* the range of negative $3 million to positive $3 million.

(ii) Notwithstanding paragraph (d)(3)(i) of this section, a Form BE-10B Bank must be filed for a foreign bank affiliate of the U.S. Reporter that owns another *nonexempt* foreign affiliate of that U.S. Reporter, even if the foreign affiliate parent is otherwise exempt, i.e., a Form BE-10B Bank must be filed for all bank affiliates upward in a chain of ownership. However, a Form BE-10B Bank is not required to be filed for a foreign bank affiliate in which the U.S. Reporter holds only an indirect ownership interest of 50 percent or less and that does not own a reportable nonbank foreign affiliate, but the indirectly owned bank affiliate must be listed on the BE-10A or BE-10A Bank Supplement.

(e) *Due date.* A fully completed and certified BE-10 report comprising Form BE-10A or 10A Bank (as required) and Form(s) BE-10B (LF), (SF), or Bank (as required) is due to be filed with BEA not later than May 31, 1990 for those U.S. Reporters filing less than fifty, and June 29, 1990 for those U.S. Reporters filing fifty or more, Forms BE-10B (LF), (SF), or Bank.

[54 FR 51879, Dec. 19, 1989]

§ 806.17 Rules and regulations for BE-12, Benchmark Survey of Foreign Direct Investment in the United States—1987.

A BE-12, Benchmark Survey of Foreign Direct Investment in the United States will be conducted covering 1987. All legal authorities, provisions, definitions, and requirements contained in §§ 806.1 through 806.13 and § 806.15 (a) through (g) are applicable to this survey. Specific additional rules and regulations for the BE-12 survey are given below.

(a) *Response required.* A response is required from persons subject to the reporting requirements of the BE-12, Benchmark Survey of Foreign Direct Investment in the United States—1987, contained herein, whether or not they are contacted by BEA. Also, a person, or their agent, contacted by BEA concerning their being subject to reporting, either by sending them a report form or by written inquiry, must respond in writing pursuant to § 806.4. This may be accomplished by completing and returning Form BE-12(X) within 30 days of its receipt and, if applicable, by completing and returning Form BE-12(LF) or Form BE-12(SF) by May 31, 1988.

(b) *Who must report.* A BE-12 report is required for each U.S. affiliate, i.e., for each U.S. business enterprise in which a foreign person owned or controlled, directly or indirectly, 10 percent or more of the voting securities if an incorporated U.S. business enterprise, or an equivalent interest if an unincorporated U.S. business enterprise, at the end of the business enterprise's 1987 fiscal year. A report is required even though the foreign person's equity interest in the U.S. business enterprise may have been established or acquired during the reporting period. Beneficial, not record, ownership is the basis of the reporting criteria.

(c) *Forms to be filed.* (1) Form BE-12(X)—Benchmark Survey of Foreign Direct Investment in the United States— 1987, Determination of Reporting Status, must be completed and filed within 30 days of its receipt by each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 1987 fiscal year and that is not fully consolidated, or in the case of real estate investments, aggregated on a Form BE-12(X) of another U.S. affiliate. Also, a person, or their agent, contacted by BEA concerning their being subject to reporting, either by sending them a report form or by written inquiry, must respond by completing and returning Form BE-12(X) within 30 days of its receipt, even if the person does not meet the requirements for reporting on Form BE-12(LF) or BE-12(SF), as contained in § 806.17(c)(2) and (3) below.

(2) Form BE-12(LF)—Benchmark Survey of Foreign Direct Investment in the United States—1987 (Long Form) must be completed and filed by May 31, 1988, by each U.S. business enterprise that was a U.S. affiliate of a foreign person at the end of its 1987 fiscal year, if:

(i) It is *not* a bank or bank holding company, and

(ii) On a fully consolidated, or, in the case of real estate investment, an aggregated basis, one or more of the following three items for the U.S. affiliate (not the foreign parent's share) exceeded $20 million (positive or negative) at the end of, or for, its 1987 fiscal year:

(A) Total assets (do not net out liabilities),

(B) Sales or gross operating revenues, excluding sales taxes, or

(C) Net income after provision for U.S. income taxes.

(3) Form BE-12(SF)—Benchmark Survey of Foreign Direct Investment in the United States—1987 (Short Form) must be completed and filed by May 31, 1988, by each U.S. business

enterprise that was a U.S. affiliate of a foreign person at the end of its 1987 fiscal year, if:

(i) On a fully consolidated, or, in the case of real estate investments, an aggregated basis, one or more of the following three items for the U.S. affiliate (not the foreign parent's share) exceeded $1 million (positive or negative), but no one item exceeded $20 million (positive or negative) at the end of, or for, its 1987 fiscal year:

(A) Total assets (do not net out liabilities),

(B) Sales or gross operating revenues, excluding sales taxes, or

(C) Net income after provision for U.S. income taxes, or if:

(ii) The U.S. affiliate *is* a bank or a bank holding company, and one or more of the following three items for the U.S. affiliate (not the foreign parent's share) exceeded $1 million (positive or negative) at the end of, or for, its 1987 fiscal year:

(A) Total assets (do not net out liabilities),

(B) Sales or gross operating revenues, excluding sales taxes, or

(C) Net income after provision for U.S. income taxes.

(d) *Aggregation of real estate investments.* All real estate investments of a foreign person must be aggregated for the purpose of applying the reporting criteria. A single report form must be filed to report the aggregate holdings, unless permission has been received from BEA to do otherwise. Those holdings not aggregated must be reported separately.

(e) *Exemption.* (1) A U.S. affiliate as consolidated, or aggregated in the case of real estate investments, is not required to file a Form BE-12(LF) or Form BE-12(SF) if each of the following three items for the U.S. affiliate (not the foreign parent's share) did not exceed $1 million (positive or negative) at the end of, or for, its 1987 fiscal year:

(i) Total assets (do not net out liabilities),

(ii) Sales or gross operating revenues, excluding sales taxes, and

(iii) Net income after provision for U.S. income taxes.

(2) If a U.S. business enterprise is a U.S. affiliate but is not required to file a completed Form BE-12(LF) or Form BE-12(SF) because it falls below the exemption level, then it must complete and file a Form BE-12(X) with item 3 marked and the information requested in item 3 filled in.

(f) *Due date.* A fully completed and certified Form BE-12(LF) or Form BE-12(SF) is due to be filed with BEA not later than May 31, 1988. In addition, Form BE-12(X) must be completed (including the certification) and filed within 30 days of the date it was received.

[53 FR 1016, Jan. 15, 1988]

§ 806.18 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This section will comply with the requirements of section 3507 (f) of the Paperwork Reduction Act (PRA) which require agencies to display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) *Display.*

15 CFR section where identified and described	Current OMB control No.
806.1 through 806.17	0608-0020 0024 0032 0004 0035 0030 0009 0023 0034 0053

[48 FR 56944, Dec. 27, 1983, as amended at 51 FR 41476, Nov. 17, 1986]

PART 807—PUBLIC INFORMATION

Sec.
807.1 Public Reference Facility.
807.2 Department of Commerce rules applicable.

§ 807.1 Public Reference Facility.

The Public Reference Facility of the Bureau of Economic Analysis is located in Room B7 of the Tower Building, 1401 K Street NW., Washington, DC

20230. The telephone number is 202-523-0595. The facility is open to the public from 8:30 a.m. to 5 p.m., Monday through Friday, except legal holidays.

(5 U.S.C. 552 as amended by Pub. L. 93-502; 5 U.S.C. 553; 5 U.S.C. 301; Reorganization Plan No. 5 of 1950; and 15 CFR Part 4 of Subtitle A)

[42 FR 38574, July 29, 1977]

§ 807.2 Department of Commerce rules applicable.

The rules applicable to the services provided in the facility and procedures to be followed for public inspection and copying of materials are found in Part 4 of Subtitle A of Title 15 CFR.

(5 U.S.C. 552 as amended by Pub. L. 93-502; 5 U.S.C. 553; 5 U.S.C. 301; Reorganization Plan No. 5 of 1950; and 15 CFR Part 4 of Subtitle A)

[42 FR 38574, July 29, 1977]

CHAPTER IX—NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE

(Parts 900-999)

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SUBCHAPTER A—GENERAL REGULATIONS

PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS

§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

(a) *Purpose.* This subpart collects and displays the control numbers assigned to information collection requirements of the National Oceanic and Atmospheric Administration (NOAA) by the Office of Management and Budget (OMB) pursuant to the Paperwork Reduction Act of 1980, Pub. L. 96-511. NOAA intends that this subpart comply with the requirements of section 3507(f) of the Paperwork Reduction Act which requires that agencies display a current control number assigned by the Director of OMB for each agency information collection requirement.

(b) *Display.*

15 CFR part or section where identified or described	Current OMB control No.
Part 908	0648–0025
917.11	0648–0008 0648–0019 0648–0034
917.22	0648–0008 0648–0019 0648–0034
917.30b	0648–0008 0648–0019 0648–0034
917.43c	0648–0119
918.7	0648–0147
921 Subpart B	0648–0121
923 Subpart J	0648–0119
924.6	0648–0141
929.7	0648–0141
935.9	0648–0141
936.9	0648–0141
937.8	0648–0141
938.8	0648–0141
970	0648–0145
981	0648–0144

(Pub. L. 96-511, 94 Stat. 2812 (44 U.S.C. Chapter 35; 5 CFR Part 1320))

[48 FR 55840, Dec. 16, 1983, as amended at 50 FR 11995, Mar. 27, 1985]

PART 903—PUBLIC INFORMATION

Sec.
903.1 Scope and purpose.
903.2 Policies.
903.3 Definitions.
903.4 Publication in the FEDERAL REGISTER.
903.5 Availability of materials for inspection and copying: indexes.
903.6 Arrangements for public inspection and copying of disclosable records.
903.7 Requests for records.
903.8 Initial determinations of availability of records.
903.9 Appeals from initial denials or untimely delays.
903.10 Fees and charges.
903.11 Officials authorized to make initial denials.

AUTHORITY: 5 U.S.C. 552 as amended by Pub. L. 93-502; 5 U.S.C. 553; Reorg. Plan No. 2 of 1965, 15 U.S.C. 311 nt; 32 FR 9734, 31 FR 10752.

SOURCE: 40 FR 41999, Sept. 10, 1975, unless otherwise noted.

§ 903.1 Scope and purpose.

(a) This part revises the rules whereby the materials specified in 5 U.S.C. 552(a)(2), and the records of all organizational elements within the National Oceanic and Atmospheric Administration (NOAA) requested under 5 U.S.C. 552(a)(3) are to be made publicly available. This revision is to conform the rules to the requirements of the Freedom of Information Act (5 U.S.C. 552), as amended by Pub. L. 93-502.88, Stat. 1561, effective February 19, 1975.

(b) The organization elements within NOAA are:

(1) The Office of the Administrator;

(2) The National Ocean Service;

(3) The National Weather Service;

(4) The National Marine Fisheries Service;

(5) The National Environmental Satellite, Data, and Information Service;

(6) The Office of Oceanic and Atmospheric Research;

(7) The Office of General Counsel;

(8) The Office of Congressional Affairs;

(9) The Office of Public Affairs;

(10) The Office for Civil Rights;

(11) The Office of NOAA Corps;

(12) The Office of Policy and Planning;

(13) The Office of Budget and Finance;

(14) The Office of Administrative and Technical Services.

[40 FR 41999, Sept. 10, 1975, as amended at 48 FR 20688, May 9, 1983; 48 FR 24039, May 31, 1983]

§ 903.2 Policies.

(a) Department of Commerce Administrative Order 205-12 attached as Appendix A to Part 4 of this title, contains the basic policies and other criteria to be considered in issuing and administering these rules. To the extent that these policies and criteria are not specified in this part or in any supplemental rules of units, they are incorporated by reference.

(b) Requests for records made under 5 U.S.C. 552(a)(3) apply only to existing records, and NOAA is not required, in response to a request, to create records by combining or compiling information contained in existing records, or otherwise to prepare new records. However, agency officials may, upon request, provide or create new information in record form pursuant to user charge statutes, such as 15 U.S.C. 1525 through 1527, or in accord with authority otherwise provided by law.

§ 903.3 Definitions.

(a) To the extent that terms used in this part are defined in 5 U.S.C. 551, they shall have the same definition herein.

(b) As used in this part "Act" means the "Freedom of Information Act" as amended, 5 U.S.C. 552.

(c) The organizational elements identified in § 903.1 are defined in Department Organization Order 25-5B (39 FR 17786, as amended).

§ 903.4 Publication in the Federal Register.

(a) Those materials which are required to be published in the FEDERAL REGISTER pursuant to the provisions of 5 U.S.C. 552(a)(1) have been and will continue to be published in the FEDERAL REGISTER in the form of or included in:

(1) Department Orders of the Department of Commerce, including any supplements and appendices thereto, Secretary of Commerce Circulars, and Department Administrative Orders.

(2) NOAA rules and regulations set forth in Chapter IX of Title 15 CFR and Title 50 CFR.

(3) Notices or otherwise in the FEDERAL REGISTER.

(4) Other publications, when incorporated by reference in the FEDERAL REGISTER with the approval of the Director of the FEDERAL REGISTER.

(b) Those materials which are published in the FEDERAL REGISTER pursuant to 5 U.S.C. 552(a)(1) will, to the extent practicable and to further assist the public, be made available for inspection and copying at the facility identified in § 903.5(c).

§ 903.5 Availability of materials for inspection and copying; indexes.

(a) The Administrator has established and maintains a NOAA Public Reference Facility for the public inspection and copying of:

(1) Final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(2) Statements of policy and interpretations adopted by NOAA and not published in the FEDERAL REGISTER;

(3) Administrative staff manuals and instructions to staff that affect a member of the public;

(4) A current index providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required to be made available or published by 5 U.S.C. 552(a)(2).

(5) Records of the final votes of each member in every proceeding of NOAA comprised of more than one member, if such final vote shall constitute the final decision of NOAA.

(6) Rules and decisions denying requests for records which otherwise implement or relate to the Act; and

(7) Materials published in the FEDERAL REGISTER pursuant to 5 U.S.C. 552(a)(1) and such additional materials as the NOAA Public Reference Facility may consider desirable and prac-

ticable to make available for the convenience of the public.

(b) NOAA may, to prevent a clearly unwarranted invasion of personal privacy, delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual or instruction, and will in each such case, explain in writing the justification for the deletion.

(c) The above materials may be inspected in the NOAA Public Reference Facility, Room 400, Building 5, 6010 Executive Boulevard, Rockville, MD. Mail to this facility should be addressed as follows: Administrative Documentation Officer (AT/IMS4), National Oceanic and Atmospheric Administration, Rockville, MD 20852. The telephone number for the facility is (301) 443-8192. The facility is open to the public Monday through Friday of each week, except on official Federal holidays, between the hours of 9:00 a.m. and 4:30 p.m. There are no fees or formal requirements for such inspections. Photo copies of these materials can be provided on demand at the prices established in § 903.10.

[40 FR 41999, Sept. 10, 1975, as amended at 48 FR 20689, May 9, 1983]

§ 903.6 Arrangements for public inspection and copying of disclosable records.

(a) During inspection of the record at the NOAA Public Reference Facility, the requester may copy by hand or have copied any portion of the record, and may obtain certification of a machine-copied record, subject to the fees established in § 903.10.

(b) No changes or alterations of any type may be made to the record being inspected, nor may any matter be added to or subtracted therefrom. Papers bound or otherwise assembled in a record file may not be disassembled by requester during inspection. Staff of the facility shall provide assistance if disassembly of a record is necessary for copying purposes, and is authorized to supervise public inspection as necessary to protect the records. Title 18, United States Code, section 2701(a), makes it a crime to conceal, remove, mutilate, obliterate, or destroy any record filed in any public office, or to attempt to do any of the foregoing.

(c) If a requester does not want to inspect a record by personal visit to the NOAA Public Reference Facility, he may request that a copy thereof be mailed to him, upon payment of the copying and postage fees set forth in § 903.10.

(d) Copies of transcripts of public hearings will be made available for inspection when not in use.

§ 903.7 Requests for records.

(a) Requests for information customarily made available by one of the organizational elements listed in § 903.1 should be directed to the appropriate office responsible for providing such information to the public. Such information offices are listed in one or more of the following:

(1) Various guides and handbooks issued by the Department of Commerce and its operating units, (2) the U.S. Government Manual, and (3) the Department of Commerce Telephone Directory. The latter two publications are for sale by the Superintendent of Documents, Washington, DC 20402. Such information is not subject to the fee schedule set forth in § 903.10 of this part and may be subject to fees established under particular statutory authorities (e.g., 15 U.S.C. 1525 through 1527).

(b) If the appropriate information office is not known, the public should direct its inquiries to the NOAA Public Reference Facility identified in § 903.5(c) or the Office of Public Affairs, National Oceanic and Atmospheric Administration, Washington, DC 20230. This facility will route the request, if it appears to be for information regularly available, to the appropriate information office; if the request is for other types of information, the facility will treat the request in accordance with paragraphs (c) through (e) of this section.

(c) A request for a record (or information contained therein) which is not customarily made available to the public as part of the agency's regular information services, or which is not available in the NOAA Public Reference Facility, shall be made in writing, with the envelope and the letter clearly marked "Freedom of Information

Request," or "Request for Records," or the equivalent, to distinguish it from other mail. Each such request so marked shall be addressed to a NOAA official identified in § 903.11 who the requester knows or has reason to believe is responsible for the records requested. If the requester is not sure which is the responsible organizational element, the request shall be addressed to the NOAA Public Reference Facility at the address specified in § 903.5(c).

(d) Any request for records deemed to be a Freedom of Information Request and which is not marked and addressed as specified in paragraph (c) of this section will be so marked and addressed by Agency personnel and forwarded immediately to the responsible organizational element. A request which is improperly addressed by the requester will not be deemed to have been "received," for purposes of the time period for processing a request for records set forth in 5 U.S.C. 552(a)(6), until the earlier of either:

(1) The time that forwarding of the request to the responsible organizational element has been effected, or (2) the time such forwarding would have been effected had due diligence been exercised by Agency personnel. In each instance when a request is so forwarded, the receiving element shall notify the requester that the request was improperly addressed and of the date the request was received.

(e) A request for records shall sufficiently identify the records requested to enable Agency personnel familiar with the subject matter to locate them with a reasonable amount of effort. The requester shall, to the extent possible, furnish specific descriptive information regarding dates and places the records were made, the file descriptions, subject matter, persons involved, and other pertinent details that will help identify the records. If the request relates to a matter in pending litigation, the court location and case shall be identified. When more than one record is requested, the request shall clearly describe each specific record, and the specific information requested which is contained in a record, so that its availability may be separately determined. Employees at the facility will assist the public to a reasonable extent in framing a request.

[40 FR 41999, Sept. 10, 1975, as amended at 48 FR 20689, May 9, 1983]

§ 903.8 Initial determinations of availability of records.

(a) Upon receipt of a request for any record, the responsible element or the NOAA Public Reference Facility shall promptly log the receipt of the request, and within ten days of its receipt (excepting Saturdays, Sundays, and legal public holidays) shall initially determine:

(1) Whether the request is for records under the Act, is for materials available otherwise than under the Act, or is for information not contained in existing records and, therefore, not under the Act. The responsible organizational element shall promptly notify the requester in writing how the request is being handled when it does not come within the Act.

(2) Whether the records requested are reasonably described and can be located on the basis of the information supplied by the requester. If any of the records requested cannot be identified and located from the information furnished, the responsible organizational element shall promptly so inform the requester in writing, specifying what additional identification is needed to assist in locating the record, and offering to assist the requester to reformulate the request. A categorical request, i.e., one for all records falling within a reasonably specific but broad category, shall be regarded as conforming to the statutory requirement that records be reasonably described, if the particular records can be identified, searched for, collected and produced without unduly burdening or disrupting the Agency's operations.

(3) Whether the records no longer exist, or are not in the Agency's possession. In each instance, the requester shall be promptly notified in writing.

(b) An authorized official shall review the request to determine the availability of the records requested.

(1) The determination shall be made within ten days (excluding Saturdays,

Sundays and legal public holidays) of the receipt of the request (as defined in § 903.7(d)), unless the time is extended as provided in paragraph (b)(2) of this section.

(2) In unusual circumstances, an official authorized to make initial denials of requests may extend the time for initial determination for up to ten days (excluding Saturdays, Sundays and legal public holidays) by written notice to the requester setting forth the reasons for the extension and the date on which a determination is expected to be dispatched. Extensions of time for the initial determination and extension of time on appeal may not exceed a total of ten days, and time taken for the former counts against available appeal extension time. "Unusual circumstances" means, but only to the extent reasonably necessary to the processing of a particular request:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request; (ii) the need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request, or (iii) the need for consultation, which shall be conducted with all practical speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the agency having substantial subject-matter interest therein.

(3) If it is determined that the records requested are to be made available, and there are no further fees to be paid, the authorized official shall promptly notify the requester as to where and when the requested records or copies may be obtained or otherwise provide them as agreed. If there are fees still to be paid by the requester, the requester shall be notified that upon payment the records will be made available immediately.

(4) Section 903.11 lists the limited number of officials who have been authorized to make initial denials of requests for records, except as may be subsequently authorized. A reply initially denying, in whole or in part, a request for records shall be in writing, signed by an authorized official, and it shall include:

(i) A reference to the specific exemption or exemptions of the Act authorizing the withholding of the records, stating briefly why the exemption applies and, where relevant, why a discretionary release is not appropriate.

(ii) The name and title or position of each official responsible for the denial authorized by § 903.11.

(iii) A statement of the manner in which any reasonably segregable portion of a record shall be provided to the requester after deletion of the portions which are determined to be exempt.

(iv) A brief statement of the right of the requester to appeal the determination, and the address to which the appeal should be sent, in accord with § 903.9(a) and (b).

(5)(i) When no determination can be made within the initial ten day period or within any extension thereof authorized by 5 U.S.C. 552(a)(6)(B), despite the exercise of due diligence by the agency, an official authorized under § 903.11 to make initial denials shall, within such time period so notify the requester in writing and including:

(A) A statement of the reasons for the delay;

(B) The date a determination is expected;

(C) That such official was responsible for determining that due diligence was exercised and that no determination was possible;

(D) A statement that requester has a right either to treat the delay as an initial denial or to appeal in accordance with § 903.9(a) and (b), in which case the address to which the appeal should be sent must be provided. The requester may be asked to forego an appeal until a determination is made. The Agency shall nevertheless continue to exercise due diligence in processing the request.

(ii) In each of the situations set forth in this section, the procedures relating to fees described in § 903.10 shall apply and be coordinated as appropriate.

[40 FR 41999, Sept. 10, 1975, as amended at 48 FR 20689, May 9, 1983]

§ 903.9 Appeals from initial denials or untimely delays.

(a) When a request for records has been initially denied in whole or in part, or otherwise has not been timely determined, the requester may submit a written appeal within thirty calendar days after the date of the written denial or on the last day of the applicable time limit in a no determination situation. The appeal shall include a copy of the original request, the initial denial, if any, and a statement as to the reasons why the records requested should be made available and why the initial denial, if that be the case, might be in error. No personal appearance, oral argument, or hearing on an appeal is provided.

(b) An appeal should be addressed to the General Counsel, U.S. Department of Commerce (DOC), Washington, DC 20230. Both the appeal envelope and the letter shall be marked clearly "Freedom of Information Appeal," or "Appeal for Records," or the equivalent. An appeal not addressed and marked as provided herein, upon recognition to be such by agency personnel, will be so marked and forwarded immediately to the General Counsel/DOC. An appeal incorrectly addressed will not be deemed to have been "received" for purposes of the time period for appeal set forth in 5 U.S.C. 522(a)(6), until the earlier of either:

(1) The time that forwarding to the General Counsel/DOC has been effected, or (2) the time such forwarding would have been effected had due diligence been exercised by agency personnel. In each instance when an appeal is so forwarded, the General Counsel/DOC shall notify the requester that the appeal was improperly addressed and of the date the appeal actually was received, or normally should have been received, in the Office of the General Counsel/DOC.

(c) An appeal shall be determined within twenty days (excluding Saturdays, Sundays, and legal public holidays) of its receipt, unless an extension of time is made in unusual circumstances, when the time for action may be extended up to ten days (excluding Saturdays, Sundays and legal public holidays) minus any days of extension granted at the initial request level. A notice of such extension shall be sent to the requester, setting forth the reasons and the date on which a determination of the appeal is expected to be sent. As used in this paragraph, "unusual circumstances" are defined in § 903.8(b)(2).

(d) If a decision on appeal is to make the records available to the requester in part or in whole, such records shall be promptly made available for inspection and copying as provioed in § 903.6.

(e) If no determination of an appeal has been sent to the requester within the twenty day period or the last extension thereof, the requester is deemed to have exhausted his administrative remedies with respect to such request, giving rise to a right of judicial review as specified in 5 U.S.C. 552(e)(4). When no determination can be sent to the requester within the applicable time limit, the Administrator shall nonetheless exercise due diligence in continuing to process the appeal. When the time limit expires, the requester shall be informed of the reason for the delay, of the date when a determination may be expected to be made, and his right to seek judicial review. The requester may be asked to forego judicial review until the appeal is determined.

(f) A determination on appeal shall be in writing and, when it denies records in whole or in part, the notice to the requester shall include:

(1) Notation of the specific exemption or exemptions of the Act authorizing the withholding, a brief explanation of how the exemption applies, and when relevant, a statement as to why a discretionary release is not appropriate; (2) a statement that the decision is final; (3) advice that judicial review of the denial is available in the district in which the requester resides or has his principal place of business, the district in which the agency records are situated, or the District of Columbia, and (4) the names and titles or positions of each official responsible for the denial of the request.

(g) Final appeal decisions are indexed and available for public inspection and copying in the Central Reference and Records Inspection Facility, Department of Commerce, Room 6628, Herbert C. Hoover Building, Washington, DC 20230. Telephone: (202) 377-4217.

[40 FR 41999, Sept. 10, 1975, as amended at 48 FR 20689, May 9, 1983]

§ 903.10 Fees and charges.

(a) *Fee schedule.* Unless waived or reduced as provided in paragraph (b) of this section, the following fees shall be charged in connection with requests for records subject to this part.

(1) *Searches other than for computerized records.* $2.50 for each one-quarter hour (or fraction thereof) per person for time spent in trying to find the records requested. This includes the time spent by clerical, professional and supervisory personnel in examining records in order to find records which are within the scope of the request, and transportation of personnel and records necessary to the search.

(2) *Searches for computerized records.* Actual direct cost of the computer time to NOAA to use the equipment involved in the search, not to exceed $270 per hour ($4.50 per minute). This fee includes both machine time, and that of related operator and clerical personnel. If programming is necessary to conduct the search, there will be an additional fee of $2.50 for each one-quarter hour (or fraction thereof) per person for programmer/analyst time. Computer printouts shall be 20 cents per page for the original and carbon copies concurrently printed.

(3) *Copying of records.* 7 cents per copy of each page up to 8½" × 14", made by photocopy or similar process. Normally, only one copy will be provided. Added copies will be provided only upon a showing of demonstrated need.

(4) *Copies of microfilm or microfiche.*

16 mm (100 ft. roll)—$6.
35 mm (100 ft. roll)—$7.
105 mm fiche—$0.25 each.
Aperture cards—$0.25 each.
$0.25 per page for each microform frame printed on paper.

(5) *Certification or authentication of records.* $3 per certification or authentication.

(6) *Forwarding records to requesting party.* Actual cost of postage, insurance and special fees, if their total exceeds $1.

(7) *Other costs.* When other duplication costs not specifically identified in this paragraph (a) of this section are requested and provided, their direct cost to NOAA shall be charged. Other services and materials requested which are not covered by this part are chargeable at actual cost to NOAA.

(b) *Waiver or reduction of fees.* A fee shall be waived or alternatively reduced for a request for records under this part where:

(1) A search fee totals $10 or less. A copying fee totals $1 or less. In determining total fees, the fees for other contemporaneous requests made by the same or related requesters shall be aggregated.

(2) Records requested by a Federal agency, Federal court (excluding parties), Congressional committee or subcommittee, the General Accounting Office, or the Library of Congress are not made under the Act, and fees payable under this part do not apply.

(3) The records are requested by a State or local government, or intergovernmental agency, a foreign government, public international organization, or any agency thereof, for purposes that are determined to be an appropriate courtesy or in the public interest and will promote the objectives of the Act and the agency.

(4) It is determined either upon petition submitted by the requester, or by a responsible official on his own initiative, that waiver or reduction of the fee is in the public interest because furnishing the information in the records requested can be considered as primarily benefiting the general public. Any such petition shall specify the intended purpose to which the records requested will be put and why all of them are necessary, and any other relevant factors in order to show how the information furnished in all or part of the records will primarily benefit the general public.

(5) It is determined by NOAA, based upon a petition therefor, that the requester is indigent, that the request for records has a strong public interest justification, and that agency resources permit a waiver of the fee.

(c) *Payment of fees.* The following conditions for payment of fees charged under this section shall apply.

(1) A search fee provided in paragraph (a) of this section which exceeds $50 is chargeable even when no record responsive to the request for records is found, or when the records requested are determined to be totally exempt from disclosure.

(2) If the requester has stated in or with his request that he is willing to pay an amount sufficient to cover the necessary search fee, a search may be made for the records without further notice to the requester, unless the requester is delinquent in making past payments, or the estimated search fee will exceed $100.

(3) If the requester has stated in or with his request that he is willing to pay estimated fees up to a specified limit not exceeding $100, a search may be made for the records without further notice if the estimated fees are less than the specified limit unless the requesting party is delinquent in making past payments.

(4) If the estimated fee (i) exceeds $100 for a request covered within paragraph (c)(2) of this section, (ii) exceeds the specified limits covered within paragraph (c)(3) of this section, or (iii) exceeds $50 and the requester has said nothing about payment or the requester is delinquent in past payments, the requester shall be notified immediately (by telephone if possible, with written confirmation) of the estimated total fee and shall be asked to pay such fee before the search may be conducted or continued. The notice may advise the requester to confer with NOAA personnel so as to attempt to reformulate the request for records to reduce the fee.

(5) The administrative time deadlines prescribed in 5 U.S.C. 522(a)(6) shall be tolled from the time the notice described in paragraph (c)(4) of this section is sent to the requester until the time that payment of the estimated fee is received from the requester, unless the responsible official determines to postpone payment of the search fee until the search has proceeded further or has been completed.

(6) Where a specific fee is determined to be payable and notice thereof has been sent to the requester, the payment of such fee shall be received before the records requested, or any part thereof, are made available to the requester.

(7) Payments of fees shall be made preferably by check or money order payable to the U.S. Department of Commerce and, they shall be paid or sent to the unit stated in the billing notice or, if none, to the unit handling the request. Where appropriate, the responsible official may require that payment be made in the form of a certified check.

(8) If an advance payment of an estimated fee exceeds the actual total fee by $1 or more, the difference shall be refunded to the requester. If the estimated fee is less than the actual fee later determined, any difference in excess of $1 may be further billed to and is payable by the requester.

[40 FR 41999, Sept. 10, 1975, as amended at 48 FR 20689, May 9, 1983]

§ 903.11 Officials authorized to make initial denials.

The following officials of the National Oceanic and Atmospheric Administration (NOAA) have been delegated authority initially to deny requests for records of their respective organizational elements. (The listings are subject to changes because of reorganizational revisions or new delegations.)

Administrator, National Oceanic and Atmospheric Administration, Washington, DC 20230.

Deputy Administrator, National Oceanic and Atmospheric Administration, Washington, DC 20230.

Associate Administrator, National Oceanic and Atmospheric Administration, Washington DC 20230.

Director, Office of Public Affairs, National Oceanic and Atmospheric Administration, Washington, DC 20230.

Director, NOAA Corps, National Oceanic and Atmospheric Administration, Rockville, MD 20852.

Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration, Washington, DC 20230.

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration, Washington, DC 20235.
Assistant Administrator for Weather Services, National Oceanic and Atmospheric Administration, Silver Spring, MD 20910.
Assistant Administrator for Environmental Satellite, Data, and Information Services, National Oceanic and Atmospheric Administration, Washington, DC 20233.
Assistant Administrator for Oceanic and Atmospheric Research, National Oceanic and Atmospheric Administration, Rockville, MD 20852.
Director, Environmental Research Laboratories, National Oceanic and Atmospheric Administration, Boulder, CO 80303.
Director, Office of Administrative and Technical Services, National Oceanic and Atmospheric Administration, Washington, DC 20230.

[48 FR 20689, May 9, 1983]

PART 904—CIVIL PROCEDURES

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AUTHORITY: 16 U.S.C. 1801-1882; 16 U.S.C. 1531-1543; 16 U.S.C. 1361-1407; 16 U.S.C. 3371-3378; 16 U.S.C. 1431-1439; 16 U.S.C. 773-773k; 16 U.S.C. 951-961; 16 U.S.C. 1021-1032; 16 U.S.C. 3631-3644; 42 U.S.C. 9101 *et seq.;* 30 U.S.C. 1401 *et seq.;* 16 U.S.C. 971-971i; 16 U.S.C. 781 *et seq.;* 16 U.S.C. 2401-2412; 16 U.S.C. 2431-2444; 16 U.S.C. 972-972h; 16 U.S.C. 916-916*l*; 16 U.S.C. 1151-1175; 16 U.S.C. 3601-3608; 16 U.S.C. 1851 note; 15 U.S.C. 4201 *et seq.*

SOURCE: 52 FR 10325, Mar. 31, 1987, unless otherwise noted.

Subpart A—General

§ 904.1 Purpose and scope.

(a) This part sets forth the procedures governing NOAA's administrative proceedings for assessment of civil penalties, suspension, revocation, modification, or denial of permits, issuance and use of written warnings, and release or forfeiture of seized property.

(b) This subpart defines terms appearing in the part and sets forth rules for the filing and service of documents in administrative proceedings covered by this part.

(c) The following statutes authorize NOAA to assess civil penalties, impose permit sanctions, issue written warnings, and/or seize and forfeit property in response to violations of those statutes:

(1) Antarctic Conservation Act of 1978, 16 U.S.C. 2401-2412;

(2) Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. 2431-2444;

(3) Atlantic Salmon Convention Act of 1982, 16 U.S.C. 3601-3608;

(4) Atlantic Striped Bass Conservation Act, 16 U.S.C. 1851 note;

(5) Atlantic Tunas Convention Act of 1975, 16 U.S.C. 971-971i;

(6) Deep Seabed Hard Mineral Resources Act, 30 U.S.C. 1401 *et seq.;*

(7) Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. 972-972h;

(8) Endangered Species Act of 1973, 16 U.S.C. 1531-1543;

(9) Fur Seal Act Amendments of 1983, 16 U.S.C. 1151-1175;

(10) Lacey Act Amendments of 1981, 16 U.S.C. 3371-3378;

(11) Land Remote-Sensing Commercialization Act of 1981, 15 U.S.C. 4201 *et seq.;*

(12) Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801-1882;

(13) Marine Mammal Protection Act of 1972, 16 U.S.C. 1361-1407;

(14) Marine Protection, Research, and Sanctuaries Act, 16 U.S.C. 1431-1439;

(15) Northern Pacific Halibut Act of 1982, 16 U.S.C. 773-773k;

(16) North Pacific Fisheries Act of 1954, 16 U.S.C. 1021-1032;

(17) Ocean Thermal Energy Conversion Act of 1980, 42 U.S.C. 9101 *et seq.;*

(18) Pacific Salmon Treaty Act of 1985, 16 U.S.C. 3631-3644;

(19) Sponge Act, 16 U.S.C. 781 *et seq.;*

(20) Tuna Conventions Act of 1950, 16 U.S.C. 951-961; and

(21) Whaling Convention Act of 1949, 16 U.S.C. 916-916*l*.

The procedures set forth in this part are intended to apply to administrative proceedings under these and later-enacted statutes administered by NOAA.

§ 904.2 Definitions.

Unless the context otherwise requires, or as otherwise noted, terms in this part have the meanings prescribed in the applicable statute or regulation. In addition, the following definitions apply:

Administrator means the Administrator of NOAA or a designee.

Agency means the National Oceanic and Atmospheric Administration (NOAA).

Applicable statute means a statute cited in § 904.1(c), and any regulations issued by NOAA to implement it.

Applicant means any person who applies or is expected to apply for a permit.

Citation means a written warning (see section 311(c) of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1861(c), and section 11(c) of the Northern Pacific Halibut Act of 1982, 16 U.S.C. 773i(c)).

Decision means an initial or final decision of the Judge.

Ex parte communication means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include inquiries regarding procedures, scheduling, and status.

Final administrative decision means an order or decision of NOAA assessing a civil penalty or permit sanction which is not subject to further Agency review under this part, and which is subject to collection proceedings or judicial review in an appropriate Federal district court as authorized by law.

Forfeiture includes, but is not limited to, surrender or relinquishment of any claim to an item by written agreement, or otherwise; or extinguishment of any claim to, and transfer of title to an item to the Government by court order or by order of the Administrator under a statute.

Initial decision means a decision of the Judge which, under applicable statute and regulation, is subject to review by the Administrator, but which becomes the final administrative decision in the absence of such review.

Judge means Administrative Law Judge.

NOAA (see *Agency*) means either the Administrator or a designee acting on behalf of the Administrator.

Party means the respondent and the Agency as represented by counsel; if they enter an appearance, a joint and several respondent, vessel owner, or permit holder; and any other person allowed to participate under § 904.204(a).

Payment agreement means any promissory note, security agreement, settlement agreement, or other contract specifying the terms according to which a permit holder agrees to pay a civil penalty.

Permit means any license, permit, certificate, or other approval issued by NOAA under an applicable statute.

Permit holder means the holder of a permit or any agent or employee of the holder, and includes the owner and operator of a vessel for which the permit was issued.

Sanction means suspension, revocation, or modification of a permit (see § 904.320).

Vessel owner means the owner of any vessel that is liable *in rem* for any civil penalty under this part, or whose permit may be subject to sanction as a result of civil penalty proceedings under this part.

Written warning means a notice in writing to a person that a violation of a minor or technical nature has been documented against the person or against the vessel which is owned or operated by the person.

§ 904.3 Filing and service of documents.

(a) Whenever this part requires service of a document or other paper, such service may effectively be made on the agent for service of process or on the attorney for the person to be served or other representative. Refusal by the person to be served, or his or her agent or attorney, of service of a document or other paper will be considered effective service of the document or other paper as of the date of such refusal. Service will be considered effective when the document is mailed to an addressee's last known address.

(b) Any documents or pleadings filed or served must be signed:

(1) By the person or persons filing the same,

(2) By an officer thereof if a corporation,

(3) By an officer or authorized employee if a government instrumentality, or

(4) By an attorney or other person having authority to sign.

(c) A pleading or document will be considered served and/or filed as of the date of the postmark (or as otherwise shown for government-franked mail); or (if not mailed) as of the date actually delivered in person; or as shown by electronic mail transmission.

(d) Time periods begin to run on the day following the date of the document, paper, or event that begins the time period. Saturdays, Sundays, and Federal holidays will be included in computing such time, except that when such time expires on a Saturday, Sunday, or Federal holiday, such period will be extended to include the next business day. This method of computing time periods also applies to any act, such as paying a civil penalty, required by this part to take place within a specified period of time. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays will be excluded in the computation.

(e) If an oral or written application is made to NOAA within 10 days after the expiration of a time period established in this part for the required filing of documents or other papers, NOAA may permit a late filing if NOAA finds reasonable grounds for an inability or failure to file within the time period. All extensions will be in writing. Except as specifically provided in this part, or by order of an Administrative Law Judge (Judge) under this part, no requests for an extension of time may be granted.

Subpart B—Civil Penalties

§ 904.100 General.

This subpart sets forth the procedures governing NOAA administrative proceedings for the assessment of civil penalties under the statutes cited in § 904.1(c).

§ 904.101 Notice of Violation and Assessment (NOVA).

(a) A NOVA will be issued by NOAA and served personally or by registered or certified mail, return receipt requested, upon the person alleged to be subject to a civil penalty (the respondent). A copy of the NOVA will similarly be served upon the permit holder or the vessel owner, if the holder or owner is not the respondent. The NOVA will contain:

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provisions of the Act, regulation, license, permit, agreement, or order allegedly violated;

(3)The findings and conclusions upon which NOAA bases the assessment; and

(4) The amount of the civil penalty assessed. The NOVA will also advise of the respondent's rights upon receipt of the NOVA, and will be accompanied by a copy of the regulations in this part governing the proceedings.

(b) In assessing a civil penalty, NOAA will take into account information available to the Agency concerning any factor to be considered under the applicable statute, and any other information that justice or the purposes of the statute require.

(c) The NOVA may also contain a proposal for compromise or settlement of the case. NOAA may also attach documents that illuminate the facts believed to show a violation.

§ 904.102 Procedures upon receipt of a NOVA.

(a) The respondent has 30 days from receipt of the NOVA in which to respond. During this time the respondent may:

(1) Accept the penalty or compromise penalty, if any, by taking the actions specified in the NOVA;

(2) Seek to have the NOVA amended, modified, or rescinded under paragraph (b) of this section;

(3) Request a hearing under paragraph (e) of this section;

(4) Request an extension of time to respond under paragraph (c) of this section; or

(5) Take no action, in which case the NOVA becomes final in accordance with § 904.104. The procedures set forth in paragraphs (a)(2), (3), (4), and (5) of this section may also be exercised by the permit holder or vessel owner.

(b) The respondent, the permit holder, or the vessel owner may seek amendment or modification of the NOVA to conform to the facts or law as that person sees them by notifying Agency counsel at the telephone number or address specified in the NOVA. If amendment or modification is sought, Agency counsel will either amend the NOVA or decline to amend it, and so notify the respondent, permit holder, or vessel owner, as appropriate.

(c) The respondent, permit holder, or vessel owner may, within the 30-day period specified in paragraph (a) of this section, request an extension of time to respond. Agency counsel may grant an extension of up to 30 days unless he or she determines that the requester could, exercising reasonable diligence, respond within the 30-day period. If Agency counsel does not respond to the request within 48 hours of its receipt, the request is granted automatically for the extension requested, up to a maximum of 30 days. A telephonic response to the request within the 48-hour period is considered an effective response, and will be followed by written confirmation.

(d) Agency counsel may, for good cause, grant an additional extension beyond the 30-day period specified in paragraph (c) of this section.

(e) If the respondent, the permit holder, or the vessel owner wishes a hearing, the request must be dated and in writing, and must be served either in person or mailed to the address specified in the NOVA. The requester must either attach a copy of the NOVA or refer to the relevant NOAA case number. Agency counsel will promptly forward the request for hearing to the Office of Administrative Law Judges.

(f) Any denial, in whole or in part, of any request under this section that is based upon untimeliness will be in writing.

(g) Agency counsel may, in his or her discretion, treat any communication from a respondent, a permit holder, or vessel owner as a request for a hearing under paragraph (e) of this section.

§ 904.103 Hearing and administrative review.

(a) Any hearing request under § 904.102(e) is governed by the hearing and review procedures set forth in Subpart C.

(b) In any hearing held in response to a request under § 904.102(e), the Administrative Law Judge (Judge) will render an initial decision. Any party to the hearing may seek the Administrator's review of the Judge's initial decision, subject to the provisions of Subpart C.

§ 904.104 Final administrative decision.

(a) If no request for hearing is timely filed as provided in § 904.102(e), the NOVA becomes effective as the final administrative decision and order of NOAA on the 30th day after service of the NOVA or on the last day of any delay period granted.

(b) If a request for hearing is timely filed in accordance with § 904.102(e), the date of the final administrative decision is as provided in Subpart C.

§ 904.105 Payment of final assessment.

(a) Respondent must make full payment of the civil penalty assessed within 30 days of the date upon which the assessment becomes effective as the final administrative decision and order of NOAA under § 904.104 or Subpart C. Payment must be made by mailing or delivering to NOAA at the address specified in the NOVA a check or money order made payable in United States currency in the amount of the assessment to the "Treasurer of the United States," or as otherwise directed.

(b) Upon any failure to pay the civil penalty assessed, NOAA may request the Justice Department to recover the amount assessed in any appropriate district court of the United States, or may act under § 904.106.

§ 904.106 Compromise of civil penalty.

(a) NOAA, in its sole discretion, may compromise, modify, remit, or mitigate, with or without conditions, any civil penalty imposed, or which is subject to imposition, except as stated in paragraph (d) of this section.

(b) The compromise authority of NOAA under this section is in addition to any similar authority provided in any applicable statute or regulation, and may be exercised either upon the initiative of NOAA or in response to a request by the alleged violator or other interested person. Any such request should be sent to Agency counsel at the address specified in the NOVA.

(c) Neither the existence of the compromise authority of NOAA under this section nor NOAA's exercise thereof at any time changes the date upon which an assessment is final or payable.

(d) *Exception.* NOAA will not compromise, modify, or remit a civil penalty imposed, or subject to imposition, under the Deep Seabed Hard Mineral Resources Act while an action to review or recover the penalty is pending in a court of the United States.

§ 904.107 Joint and several respondents.

(a) A NOVA may assess a civil penalty against two or more respondents jointly and severally. Each respondent is liable for the entire penalty, but no more than the amount finally assessed may be collected from the respondents.

(b) A hearing request by one respondent is considered a request by the other respondents. Agency counsel, having received a hearing request from one respondent, will send a copy of it to the other joint and several respondents in the case.

(c) A decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is binding on all parties and on all other joint and several respondents, whether or not they entered an appearance.

§ 904.108 Factors considered in assessing penalties.

(a) Factors to be taken into account in assessing a penalty, depending upon the statute in question, may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other matters as justice may require. NOAA will take into account a respondent's ability to pay when assessing a civil penalty for a violation of any of the statutes NOAA administers.

(b) NOAA may, in consideration of a respondent's ability to pay, increase or decrease a penalty from an amount that would otherwise be warranted by the other relevant factors. A penalty may be increased if a respondent's ability to pay is such that a higher penalty is necessary to deter future violations, or for commercial violators, to make a penalty more than a cost of doing business. A penalty may be decreased if the respondent establishes that he or she is unable to pay an otherwise appropriate penalty amount.

(c) If a respondent asserts that a penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA. NOAA will not consider a respondent's inability to pay unless the respondent, upon request, submits such financial information as Agency counsel determines is adequate to evaluate the respondent's financial condition. Depending on the circumstances of the case, Agency counsel may require the respondent to complete a financial information request form, answer written interrogatories, or submit independent verification of his or her financial information. If the respondent does not submit the requested financial information, he or she will be presumed to have the ability to pay the penalty.

(d) Financial information relevant to a respondent's ability to pay includes, but is not limited to, the value of respondent's cash and liquid assets, ability to borrow, net worth, liabilities, income, prior and anticipated profits, expected cash flow, and the respondent's ability to pay in installments over time. A respondent will be considered able to pay a penalty even if he or she must take such actions as pay in installments over time, borrow money, liquidate assets, or reorganize his or her business. NOAA's consideration of a respondent's ability to pay does not preclude an assessment of a penalty in an amount that would cause or contribute to the bankruptcy or other discontinuation of the respondent's business.

(e) Financial information regarding respondent's ability to pay should be submitted to Agency counsel as soon after receipt of the NOVA as possible. If a respondent has requested a hearing on the offense alleged in the NOVA and wants his or her inability to pay considered in the initial decision of the Judge, verifiable financial information must be submitted to

Agency counsel at least 15 days in advance of the hearing. In deciding whether to submit such information, the respondent should keep in mind that the Judge may assess *de novo* a civil penalty either greater or smaller than that assessed in the NOVA.

(f) Issues regarding ability to pay will not be considered in an administrative review of an initial decision if the financial information was not previously presented by the respondent to the Judge at the hearing.

Subpart C—Hearing and Appeal Procedures

GENERAL

§ 904.200 Scope and applicability.

(a) This subpart sets forth the procedures governing the conduct of hearings and the issuance of initial and final decisions of NOAA in administrative proceedings involving alleged violations of the laws cited in § 904.1(c) and regulations implementing these laws, including civil penalty assessments and permit sanctions and denials. By separate regulation, these rules may be applied to other proceedings.

(b) Subject to the administrative direction of the Chief Administrative Law Judge, each Administrative Law Judge (Judge) assigned by the Chief Administrative Law Judge is delegated authority to make the initial or final decision of the Agency (whichever is made appropriate by regulation outside this subpart) in proceedings subject to the provisions of this subpart, and to take actions to promote the efficient and fair conduct of hearings as set out in this subpart. The Judge has no authority to rule on challenges to the validity of regulations promulgated by the Agency.

(c) This subpart is not an independent basis for claiming the right to a hearing, but instead prescribes procedures for the conduct of hearings, the right to which is provided by other authority.

§ 904.201 Case docketing.

Each request for hearing promptly upon its receipt for filing in the Office of Administrative Law Judges will be assigned a docket number and thereafter the proceeding will be referred to by such number. Written notice of the assignment of hearing to a Judge will promptly be given to the parties.

§ 904.202 Filing of documents.

(a) Pleadings, papers, and other documents in the proceeding must be filed in conformance with § 904.3 directly with the Judge, with copies served on all other parties. Pleadings, papers, and other documents pertaining to administrative review under § 904.273 must be filed with the Administrator, with copies served on all other parties.

(b) Unless otherwise ordered by the Judge, discovery requests and answers will be served on the opposing party and need not be filed with the Judge.

§ 904.203 Appearances.

A party may appear in person or by or with counsel or other representative.

§ 904.204 Duties and powers of judge.

The Judge has all powers and responsibilities necessary to preside over the parties and the proceeding, to hold prehearing conferences, to conduct the hearing, and to make the decision in accordance with these regulations and 5 U.S.C. 554 through 557, including, but not limited to, the authority and duty to do the following:

(a) Rule on a request to participate as a party in the proceeding by allowing, denying, or limiting such participation (such ruling will consider views of the parties and be based on whether the requester could be directly and adversely affected by the decision and whether the requester can be expected to contribute materially to the disposition of the proceedings);

(b) Schedule the time, place, and manner of conducting the pre-hearing conference or hearing, continue the hearing from day to day, adjourn the hearing to a later date or a different place, and reopen the hearing at any time before issuance of the decision, all in the Judge's discretion, having due regard for the convenience and necessity of the parties and witnesses;

(c) Schedule and regulate the course of the hearing and the conduct of the participants and the media, including the power to close the hearings in the interests of justice; seal the record from public scrutiny to protect privileged information, trade secrets, and confidential commercial or financial information; and strike testimony of a witness who refuses to answer a question ruled to be proper;

(d) Administer oaths and affirmations to witnesses;

(e) Rule on discovery requests, establish discovery schedules, and, whenever the ends of justice would thereby be served, take or cause depositions or interrogatories to be taken and issue protective orders under § 904.240(d);

(f) Rule on motions, procedural requests, and similar matters;

(g) Receive, exclude, limit, and otherwise rule on offers of proof and evidence;

(h) Examine and cross-examine witnesses and introduce into the record on the Judge's own initiative documentary or other evidence;

(i) Rule on requests for appearance of witnesses or production of documents and take appropriate action upon failure of a party to effect the appearance or production of a witness or document ruled relevant and necessary to the proceeding; as authorized by law, issue subpoenas for the appearance of witnesses or production of documents;

(j) Require a party or witness at any time during the proceeding to state his or her position concerning any issue or his or her theory in support of such position;

(k) Take official notice of any matter not appearing in evidence that is among traditional matters of judicial notice; or of technical or scientific facts within the general or specialized knowledge of the Department of Commerce as an expert body; or of a nonprivileged document required by law or regulation to be filed with or published by a duly constituted government body; or of any reasonably available public document; *Provided,* That the parties will be advised of the matter noticed and given reasonable opportunity to show the contrary;

(l) For stated good reason(s), assess a penalty *de novo* without being bound by the amount assessed in the NOVA;

(m) Prepare and submit a decision or other appropriate disposition document and certify the record;

(n) Award attorney fees and expenses as provided by applicable statute or regulation; and

(o) Grant preliminary or interim relief.

§ 904.205 Disqualification of Judge.

(a) The Judge may withdraw voluntarily from a particular case when the Judge deems himself/herself disqualified.

(b) A party may in good faith request the Judge to withdraw on the grounds of personal bias or other disqualification. The party seeking the disqualification must file with the Judge a timely affidavit or statement setting forth in detail the facts alleged to constitute the grounds for disqualification, and the Judge will rule on the matter. If the Judge rules against disqualification, the Judge will place all matters relating to such claims of disqualification in the record.

§ 904.206 Pleadings, motions, and service.

(a) The original of all pleadings and documents must be filed with the Office of Administrative Law Judges and a copy served upon each party. All pleadings or documents when submitted for filing must show that service has been made upon all parties. Such service must be made in accordance with § 904.3(a).

(b) Pleadings and documents to be filed may be reproduced by printing or any other process, provided the copies are clear and legible; must be dated, the original signed in ink or as otherwise verified for electronic mail; and must show the docket description and title of the proceeding, and the title, if any, address, and telephone number of the signatory. If typewritten, the impression may be on only one side of the paper and must be double spaced, pica type, if possible, except that quotations may be single spaced and indented.

(c) Motions must normally be made in writing and must state clearly and concisely the purpose of and relief sought by the motion, the statutory or principal authority relied upon, and the facts claimed to constitute the grounds requiring the relief requested.

(d) Unless otherwise provided, the answer to any written motion, pleading, or petition must be served within 20 days after date of service thereof. If a motion states that opposing counsel has no objection, it may be acted upon as soon as practicable, without awaiting the expiration of the 20-day period. Answers must be in writing, unless made in response to an oral motion made at a hearing; must fully and completely advise the parties and the Judge concerning the nature of the opposition; must admit or deny specifically and in detail each material allegation of the pleading answered; and must state clearly and concisely the facts and matters of law relied upon. Any new matter raised in an answer will be deemed controverted.

(e) A response to an answer will be called a reply. A short reply restricted to new matters may be served within 15 days of service of an answer. The Judge has discretion to dispense with the reply. No further responses are permitted.

§ 904.207 Amendment of pleadings or record.

The Judge, upon his or her own initiative or upon application by a party, may order a party to make a more definite statement of any pleading. The Judge has discretion to permit either party to amend its pleadings upon conditions fair to both parties. Harmless errors may be corrected (by deletion or substitution of words or figures), and broad discretion will be exercised by the Judge in permitting such corrections.

§ 904.208 Extensions of time.

If appropriate and justified, and as provided in § 904.3(e), the Judge may grant any request for an extension of time. Requests for extensions of time must, except in extraordinary circumstances, be made in writing.

§ 904.209 Expedited proceedings.

In the interests of justice and administrative efficiency, the Judge, on his or her own initiative or upon the application of any party, may expedite the proceeding. A motion of a party to expedite the proceeding may, in the discretion of the Judge, be made orally or in writing with concurrent actual notice to all parties. If a motion for an expedited hearing is granted, the hearing on the merits may not be scheduled with less than three days' notice, unless all parties consent to an earlier hearing.

§ 904.210 Summary decision.

(a) At any time after a proceeding begins, a party may move for or the Judge on his or her own motion may grant a summary decision disposing of all or part of the issues.

(b) A summary decision may be rendered if the entire record shows as to the issue(s) under consideration:

(1) That there is no genuine issue as to any material fact; and

(2) That the moving party is entitled to summary decision as a matter of law.

§ 904.211 Failure to appear.

(a) If a party fails to appear after proper service of notice, the hearing may proceed. A notation of failure to appear will be made in the record, and the hearing may be conducted with the parties then present, or may be terminated if the Judge determines that proceeding with the hearing will not aid the decisional process.

(b) The Judge will place in the record all the facts concerning the issuance and service of the notice of time and place of hearing.

(c) The Judge may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record.

§ 904.212 Dismissal for failure to prosecute or defend.

Whenever the record discloses the failure of either party to file documents, respond to orders or notices from the Judge, or otherwise indicates an intention on the part of either party not to participate further in the proceeding, the Judge may issue an order to show cause why the case should not be dismissed or disposed of adversely to that party's interest, or make such order as is necessary for the just and expeditious resolution of the case, including dismissal of the matter from the docket for failure to prosecute or defend. Such dismissal or other order is subject to §§ 904.272 and 904.273.

§ 904.213 Settlements.

If settlement is reached before the Judge has certified the record, the Judge may require the submission of a copy of the settlement agreement to assure that the Judge's consideration of the case is completed and to order the matter dismissed on the basis of the agreement.

§ 904.214 Stipulations.

The parties may, by stipulation, agree upon any matters involved in the proceeding and include such stipulations in the record with the consent of the Judge. Written stipulations must be signed and served upon all parties.

§ 904.215 Consolidation.

The Judge may order two or more proceedings that involve substantially the same parties or the same issues consolidated and/or heard together.

§ 904.216 Prehearing conferences.

(a) Prior to any hearing or at other time deemed appropriate, the Judge may, upon his or her own initiative, or upon the application of any party, arrange a telephone conference and, where appropriate, record such telephone conference, or direct the parties to appear for a conference to consider:

(1) Simplification or clarification of the issues or settlement of the case by consent;

(2) The possibility of obtaining stipulations, admissions, agreements, and rulings on admissibility of documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;

(3) Agreements and rulings to facilitate the discovery process;

(4) Limitation of the number of expert witnesses or other avoidance of cumulative evidence;

(5) The procedure, course, and conduct of the hearing;

(6) The distribution to the parties and the Judge prior to the hearing of written testimony and exhibits in order to expedite the hearing;

(7) Such other matters as may aid in the disposition of the proceeding.

(b) The Judge in his or her discretion may issue an order showing the matters disposed of in such conference.

DISCOVERY

§ 904.240 Discovery generally.

(a) *Preliminary position on issues and procedures.* Prior to hearing the Judge will ordinarily require from the parties a written submission stating their preliminary positions on legal and factual issues and procedures, listing potential witnesses and summarizing their testimony, and listing exhibits. This document, which must be served on all other parties, will normally obviate the need for further discovery. Failure to provide the requested information may result in the exclusion of witnesses and/or exhibits at the hearing. See also § 904.212. A party has the affirmative obligation to supplement the submission as new information becomes known to the party.

(b) *Additional discovery.* Upon written motion by a party, the Judge may allow additional discovery only upon a showing of relevance, need, and reasonable scope of the evidence sought, by one or more of the following methods: deposition upon oral examination or written questions, written interrogatories, production of documents or things for inspection and other purposes, and requests for admission.

(c) *Time limits.* Motions for depositions, interrogatories, admissions, or production of documents or things may not be filed within 20 days of hearing except on order of the Judge for good cause shown. Oppositions to a discovery motion must be filed within 10 days of service unless otherwise provided in these rules or by the Judge.

(d) *Oppositions.* Oppositions to any discovery motion or portion thereof must state with particularity the grounds relied upon. Failure to object in a timely fashion constitutes waiver of the objection.

(e) *Scope of discovery.* The Judge may limit the scope, subject matter, method, time, or place of discovery. Unless otherwise limited by order of the Judge, the scope of discovery is as follows:

(1) *In general.* As allowed under paragraph (b) of this section, parties may obtain discovery of any matter, not privileged, that is relevant to the allegations of the charging document, to the proposed relief, or to the defenses of any respondent, or that appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Hearing preparation: Materials.* A party may not obtain discovery of materials prepared in anticipation of litigation except upon a showing that the party seeking discovery has a substantial need for the materials in preparation of his or her case, and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. Mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party are not discoverable under this section.

(3) *Hearing preparation: Experts.* A party may discover the substance of the facts and opinions to which an expert witness is expected to testify and a summary of the grounds for each opinion. A party may also discover facts known or opinions held by an expert consulted by another party in anticipation of litigation but not expected to be called as a witness upon a showing of exceptional circumstances making it impracticable for the party seeking discovery to obtain such facts or opinions by other means.

(f) *Failure to comply.* If a party fails to comply with any subpoena or order concerning discovery, the Judge may, in the interest of justice:

(1) Infer that the admission, testimony, documents, or other evidence would have been adverse to the party;

(2) Rule that the matter or matters covered by the order or subpoena are established adversely to the party;

(3) Rule that the party may not introduce into evidence or otherwise rely upon, in support of any claim or defense, testimony by such party, officer, or agent, or the documents or other evidence;

(4) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown;

(5) Strike part or all of a pleading, a motion or other submission by the party, concerning the matter or matters covered by the order or subpoena;

(6) Render a decision of the proceeding against the party.

§ 904.241 Depositions.

(a) *Notice.* If a motion for deposition is granted, and unless otherwise ordered by the Judge, the party taking the deposition of any person must serve on that person, and each other party, written notice at least 15 days before the deposition would be taken (or 25 days if the deposition is to be taken outside the United States). The notice must state the name and address of each person to be examined, the time and place where the examination would be held, the name and mailing address of the person before whom the deposition would be taken, and the subject matter about which each person would be examined.

(b) *Taking the deposition.* Depositions may be taken before any officer authorized to administer oaths by the law of the United States or of the place where the examination is to be held, or before a person appointed by the Judge. Each deponent will be sworn, and any party has the right to cross-examine. Objections are not waived by failure to make them during the deposition unless the ground of the objection is one that might have been removed if presented at that time. The deposition will be recorded, transcribed, signed by the deponent, unless waived, and certified by the officer before whom the deposition was taken. All transcription costs associated with the testimony of a deponent will be borne by the party seeking the deposition. Each party will bear its own expense for any copies of the transcript. See also § 904.252(c).

(c) *Alternative deposition methods.* By order of the Judge, the parties may use other methods of deposing parties or witnesses, such as telephonic depositions or depositions upon written questions. Objections to the form of written questions are waived unless made within five days of service of the questions.

(d) *Use of depositions at hearing.* (1) At hearing any part or all of a deposition, so far as admissible under the rules of evidence applied as though the witness were then testifying, may be used against any party who was present or represented at the taking of the deposition, or had reasonable notice.

(2) The deposition of a witness may be used by any party for any purpose if the Judge finds:

(i) That the witness is unable to attend due to death, age, health, imprisonment, disappearance or distance from the hearing site; or

(ii) That exceptional circumstances make it desirable, in the interest of justice, to allow the deposition to be used.

(3) If only part of a deposition is offered in evidence by a party, any party may introduce any other part.

§ 904.242 Interrogatories to parties.

(a) *Use at hearing.* If ordered by the Judge, any party may serve upon any other party written interrogatories. Answers may be used at hearing in the same manner as depositions under § 904.241(d).

(b) *Answers and objections.* Answers and objections must be made in writing under oath, and reasons for the objections must be stated. Answers must be signed by the person making them and objections by the attorney making them. Unless otherwise ordered, answers and objections must be served on all parties within 20 days after service of the interrogatories.

(c) *Option to produce records.* Where the answer to an interrogatory may be ascertained from the records of the party upon whom the interrogatory is served, it is sufficent to specify such records and afford the party serving the interrogatories an opportunity to examine them.

§ 904.243 Admissions.

(a) *Request.* If ordered by the Judge, any party may serve on any other party a written request for admission of the truth of any relevant matter of fact set forth in the request, including the genuineness of any relevant document described in the request. Copies of documents must be served with the request. Each matter of which an admission is requested must be separately stated.

(b) *Response.* Each matter is admitted unless a written answer or objection is served within 20 days of service of the request, or within such other time as the Judge may allow. The answering party must specifically admit or deny each matter, or state the reasons why he or she cannot truthfully admit or deny it.

(c) *Effect of admission.* Any matter admitted is conclusively established unless the Judge on motion permits withdrawal or amendment of it for good cause shown.

§ 904.244 Production of documents and inspection.

(a) *Scope.* If ordered by the Judge, any party may serve on any other party a request to produce a copy of any document or specifically designated category of documents, or to inspect, copy, photograph, or test any such document or tangible thing in the possession, custody, or control of the party upon whom the request is served.

(b) *Procedure.* The request must set forth:

(1) The items to be produced or inspected by item or by category, described with reasonable particularity, and

(2) A reasonable time, place, and manner for inspection. The party upon whom the request is served must serve within 20 days a response or objections, which must address each item or category and include copies of the requested documents.

§ 904.245 Subpoenas.

(a) *In general.* Subpoenas for the attendance and testimony of witnesses and the production of documentary evidence for the purpose of discovery or hearing may be issued as authorized by the statute under which the proceeding is conducted.

(b) *Timing.* Applications for subpoenas must be submitted at least 10 days before the scheduled hearing or deposition.

(c) *Motions to quash.* Any person to whom a subpoena is directed or any party may move to quash or limit the subpoena within 10 days of its service or on or before the time specified for compliance, whichever is shorter. The Judge may quash or modify the subpoena.

(d) *Enforcement.* In case of disobedience to a subpoena, NOAA may request the Justice Department to invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

HEARINGS

§ 904.250 Notice of time and place of hearing.

(a) The Judge will promptly serve on the parties notice of the time and place of hearing. The hearing will not, except in extraordinary circumstances, be held less than 20 days after service of the notice of hearing.

(b) In setting a place for hearing, the Judge will consider the convenience and costs of the parties, including but not limited to transportation costs and living expenses of witnesses, attorneys, and the Judge; place of residence of the respondent(s); scheduling of other hearings within the same region; and availability of facilities and court reporters.

(c) The Judge may order that all or part of a proceeding be heard on submissions or affidavits if it appears that substantially all important issues of material fact may be resolved by means of written materials and that efficient disposition of the proceeding can be made without oral hearing. For good cause, the Judge may also order that testimony of witnesses be taken by telephone.

§ 904.251 Evidence.

(a) At the hearing, every party has the right to present oral or documentary evidence in support of its case or defense, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. This paragraph may not be interpreted to diminish the powers and duties of the Judge under this subpart.

(b) All evidence that is relevant, material, reliable, and probative, and not unduly repetitious or cumulative, is admissible at the hearing. Formal rules of evidence do not necessarily apply to the proceedings, and hearsay evidence is not inadmissible as such.

(c) Formal exceptions to the rulings of the Judge are unnecessary. It is sufficient that a party, at the time of the ruling, makes known the action that it desires the Judge to take or its objection to an action taken, and the grounds therefor. Rulings on each objection must appear in the record.

(d) In any case involving a charged violation of law in which the party charged has admitted an allegation, evidence may be taken to establish matters of aggravation or mitigation.

(e) Exhibits in a foreign language must be translated into English before such exhibits are offered into evidence. Copies of both the untranslated and translated versions of the proposed exhibits, along with the name of the translator, must be served on the opposing party at least 10 days prior to the hearing unless the parties otherwise agree.

(f) A party who intends to raise an issue concerning the law of a foreign country must give reasonable notice. The Judge, in determining foreign law, may consider any relevant material or source, whether or not submitted by a party.

§ 904.252 Witnesses.

(a) Any witness not a party may have personal counsel to advise him or her as to his or her rights, but such counsel may not otherwise participate in the hearing.

(b) Witnesses who are not parties may be excluded from the hearing room prior to the taking of their testimony.

(c) Witnesses other than NOAA employees subpoenaed under these rules, including § 904.245, will be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken are entitled to the same fees as are paid for like services in the courts of the United States. Fees and any other related expenses for NOAA emoloyees as authorized by the NOAA travel handbook will be paid by the party at whose instance the witness appears or the deposition is taken.

(d) If a witness is expected to testify in a language other than the English language, the party sponsoring the witness must provide for the services of an interpreter and advise opposing counsel 10 days prior to the hearing concerning the extent to which interpreters are to be used. When available, the interpreter must be court certified under 28 U.S.C. 1827.

§ 904.253 Interlocutory appeals.

(a) At the request of a party or on the Judge's own initiative, the Judge may certify to the Administrator for review a ruling that does not finally dispose of the proceeding, if the Judge determines that an immediate appeal therefrom may materially advance the ultimate disposition of the matter.

(b) Upon certification by the Judge of the interlocutory ruling for review, the parties have 10 days to serve any briefs associated with the certification. The Administrator will promptly decide the matter.

(c) No interlocutory appeal lies as to any ruling not certified by the Judge.

§ 904.254 Ex parte communications.

(a) Except to the extent required for disposition of ex parte matters as authorized by law, after issuance of a NOVA, NOPS, or NIDP and until the final decision of the Agency is effective under these regulations, no ex parte communication relevant to the merits of the proceeding may be made, or knowingly caused to be made:

(1) By the Judge or by an Agency employee involved in the decisional process of the proceeding to any interested person outside the Department of Commerce or to any Agency employee involved in the investigation or prosecution of the case;

(2) By any Agency employee involved in the investigation or prosecution of the case to the Judge or to any Agency employee involved in the decisional process of the proceeding; or

(3) By an interested person outside the Department of Commerce to the Judge or to any Agency employee involved in the decisional process of the proceeding.

(b) An Agency employee or Judge who makes or receives a prohibited communication must place in the hearing record the communication and any response thereto, and the Judge or Administrator, as appropriate, may take action consistent with these rules, the applicable statute, and 5 U.S.C. 556(d) and 557(d).

(c) Agency counsel may not participate or advise in the decision of the Judge or the Administrator's review thereof except as witness or counsel in the proceeding in accordance with this subpart. In addition, the Judge may not consult any person or party on a fact in issue unless notice and opportunity for all parties to participate is provided.

(d)(1) Paragraphs (a) and (b) of this section do not apply to communications concerning national defense or foreign policy matters. Such ex parte communications to or from an Agency employee on national defense or foreign policy matters, or from employees of the United States Government involving intergovernmental negotiations, are allowed if the communicator's position with respect to those matters cannot otherwise be fairly presented for reasons of foreign policy or national defense.

(2) Ex parte communications subject to this paragraph will be made a part of the record to the extent that they do not include information classified under an Executive Order. Classified information will be included in a classified portion of the record that will be available for review only in accordance with applicable law.

POST-HEARING

§ 904.260 Official transcript.

(a) The official transcript of testimony taken, together with any exhibits, briefs, or memoranda of law filed therewith, will be filed with the Office of Administrative Law Judges. Transcripts of testimony will be available in any proceeding and will be supplied to the parties upon the payment of fees at the rate provided in the agreement with the reporter.

(b) The Judge may determine whether "ordinary copy," "daily copy," or other copy (as those terms are defined by contract) will be necessary and required for the proper conduct of the proceeding.

§ 904.261 Post-hearing briefs.

(a) Unless a different schedule is established in the discretion of the Judge, including the procedure in paragraph (b) of this section, the parties may file proposed findings of fact and conclusions of law, together with supporting briefs, within 30 calendar days from service of the hearing transcript. Reply briefs may be submitted within 15 days after service of the proposed findings and conclusions to which they respond, unless the Judge sets a different schedule.

(b) In cases involving few parties, limited issues, and short hearings, the Judge may require that any proposed findings and conclusions and reasons in support be presented orally at the close of the hearing. In such case, the Judge will advise the parties in advance of hearing.

§ 904.262 Documents, copies and exhibits.

(a) If original documents have been received in evidence, a true copy thereof, or of such part as may be material or relevant, may be substituted in lieu of the original during the hearing or at its conclusion. The Judge may, in his or her discretion, and after notice to the other parties, allow the withdrawal of original exhibits or any part thereof by the party entitled thereto for the purpose of substituting copies. The substitution of true copies of exhibits, or any part thereof, may be required by the Judge in his or her discretion as a condition of granting permission for withdrawal of the original.

(b) Photographs may be substituted for physical evidence in the discretion of the Judge.

(c) Except upon the Judge's order, or upon request by a party, physical evidence will be retained after the hearing by the authorized enforcement officer responsible for the case.

DECISION

§ 904.270 Record of decision.

(a) The exclusive record of decision consists of the official transcript of testimony and proceedings; exhibits admitted into evidence; briefs, pleadings, and other documents filed in the proceeding; and descriptions or copies of matters, facts, or documents officially noticed in the proceeding. Any other exhibits and records of any ex parte communications will accompany the record of decision.

(b) The Judge will arrange for appropriate storage of the records of any proceeding, which place of storage need not necessarily be located physically within the Office of Administrative Law Judges.

(c) Exhibits offered after the close of a hearing will not be admitted, unless the Judge specifically keeps open or reopens the record to admit them.

§ 904.271 Decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion presented on the record, and the ruling on any proposed findings or conclusions presented by the parties;

(2) A statement of any facts noticed or relied upon in the decision; and

(3) Such other matters as the Judge considers appropriate.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. The Judge may in such case direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties by registered or certified mail, return receipt requested, and will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) Unless the Judge orders a stay under § 904.272, or unless a petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative, an initial decision becomes effective as the final administrative decision of NOAA 30 days after service, unless otherwise provided by statute or regulations.

§ 904.272 Petition for reconsideration.

Unless an order of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided and the alleged errors or relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or decision. Neither the filing nor the granting of a petition for reconsideration may operate as a stay of an order or decision or its effectiveness date (including for purposes of § 904.273) unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the proceeding may file an answer in support or in opposition. In the Judge's discretion, the hearing may be reopened to consider matters raised in a petition that could not reasonably have been foreseen prior to issuance of the order or decision.

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party may petition for review of an initial decision of the Judge within 30 days after the date the decision is served. The petition shall be addressed to the Administrator and filed at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW., Washington, DC 20230.

(b) Review by the Administrator of an initial decision is discretionary and is not a matter of right. A petition for review nust be served upon all parties. If a party files a timely petition for discretionary review, or action to review is taken by the Administrator upon his or her own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator.

(c) Petitions for discretionary review may be filed only upon one or more of the following grounds:

(1) A finding of a material fact is clearly erroneous based upon the evidence in the record;

(2) A necessary legal conclusion is contrary to law or precedent:

(3) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or

(4) A prejudicial procedural error has occurred.

(d) Each issue must be separately numbered, concisely stated, and supported by detailed citations to the record, statutes, regulations, and principal authorities. Issues of fact or law not argued before the Judge may not be raised on review unless they were raised for the first time in the initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) No oral argument on petitions for discretionary review will be allowed.

(f) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. No further replies are allowed.

(g) If the Administrator declines to exercise discretionary review, such order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final decision of NOAA. The Administrator need not give reasons for declining review.

(h) If the Administrator grants a petition for discretionary review, he or she will issue an order specifying issues to be briefed and a briefing schedule. Such issues may constitute one or more of the issues raised in the petition for discretionary review and/or matters the Administrator wishes to review on his or her own initiative. Only those issues specified in the order may be argued in the briefs and considered by the Administrator. No oral argument will be permitted.

(i) After expiration of the period for filing briefs under paragraph (h) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision.

Subpart D—Permit Sanctions and Denials

GENERAL

§ 904.300 Scope and applicability.

(a) This subpart sets forth policies and procedures governing the suspension, revocation, modification, and denial of permits for reasons relating to enforcement of the statutes cited in § 904.1(c), except for the statutes listed in paragraph (b) of this section. These reasons include nonpayment of civil penalties or criminal fines, and violations of statutes, regulations, or permit conditions. Nothing in this subpart precludes sanction or denial of a permit for reasons not relating to enforcement. As appropriate, and unless otherwise specified in this subpart, the provisions of Subparts A, B, and C apply to this subpart.

(b) Regulations governing sanctions and denials of permits issued under the Deep Seabed Hard Mineral Resources Act (30 U.S.C. 1401 *et seq.*) appear at 15 CFR Part 970; under the Ocean Thermal Energy Conversion Act of 1980 (42 U.S.C. 9101 *et seq.*), at 15 CFR Part 981.

§ 904.301 Bases for sanctions or denials.

(a) Unless otherwise specified in a settlement agreement, or otherwise provided in this subpart, NOAA may take action under this subpart with respect to any permit issued under the statutes cited in § 904.1(c). The bases for an action to sanction or deny a permit are as follows:

(1) The commission of any offense prohibited by any statute administered by NOAA, including violation of any regulation promulgated or permit condition or restriction prescribed thereunder, by the permit holder or with the use of a permitted vessel;

(2) The failure to pay a civil penalty assessed under Subparts B and C of this part; or

(3) The failure to pay a criminal fine imposed or to satisfy any other liability incurred in a judicial proceeding under any of the statutes administered by NOAA.

(b) A sanction may be imposed or a permit denied under this subpart with respect to the particular permit pertaining to the offense or nonpayment, and may also be applied to any NOAA permit held or sought by the permit holder, including permits for other activities or for other vessels. Examples of the application of this policy are the following:

(1) NOAA suspends Vessel A's fishing permit for nonpayment of a civil penalty pertaining to Vessel A. The owner of Vessel A buys Vessel B and applies for a permit for Vessel B to participate in the same or a different fishery. NOAA may withhold that permit until the sanction against vessel A is lifted.

(2) NOAA revokes a Marine Mammal Protection Act permit for violation of its conditions. The permit holder subsequently applies for a permit under the Endangered Species Act. NOAA may deny the ESA application.

(3) Captain X, an officer in Country Y's fishing fleet, is found guilty of assaulting an enforcement officer. NOAA may impose a condition on the permits of Country Y's vessels that they may not fish in the fishery conservation zone with Captain X aboard. (See § 904.320(c).)

(c) Sanction not extinguished by sale. [Reserved]

§ 904.302 Notice of permit sanction (NOPS).

(a) A NOPS will be served personally or by registered or certified mail, return receipt requested, on the permit holder. When a foreign fishing vessel is involved, service will be made on the agent authorized to receive and respond to any legal process for vessels of that country.

(b) The NOPS will set forth the sanction to be imposed, the bases for the sanction, and any opportunity for a hearing. It will state the effective date of the sanction, which will ordinarily not be earlier than 30 calendar days after the date of receipt of the NOPS (see § 904.322).

(c) Upon demand by an authorized enforcement officer, a permit holder must surrender a permit against which a sanction has taken effect. The effectiveness of the sanction, however, does not depend on surrender of the permit.

§ 904.303 Notice of intent to deny permit (NIDP).

(a) NOAA may issue an NIDP if the applicant has been charged with a violation of a statute, regulation, or permit administered by NOAA.

(b) The NIDP will set forth the basis for its issuance and any opportunity for a hearing, and will be served in accordance with § 904.302(a).

(c) NOAA will not refund any fee(s) submitted with a permit application if an NIDP is issued.

(d) An NIDP may be issued in conjunction with or independent of a NOPS. Nothing in this section should be interpreted to preclude NOAA from initiating a permit sanction action following issuance of the permit, or from withholding a permit under § 904.310(c) or § 904.320.

§ 904.304 Opportunity for hearing.

(a) Except as provided in paragraph (b) of this section, the recipient of a NOPS or NIDP will be provided an opportunity for a hearing. The hearing may be combined with any other hearing under this part.

(b) There will be no opportunity for a hearing if, with respect to the violation that forms the basis for the NOPS or NIDP, the permit holder had a previous opportunity to participate as a party in a judicial or administrative hearing, whether or not the permit holder did participate, and whether or not such a hearing was held.

(c) If entitled to a hearing under this section, the recipient of a NOPS or NIDP will have 30 calendar days from receipt of the notice to request a hearing. A request for hearing must be dated and in writing. Failure to request a hearing within 30 days constitutes a waiver of the opportunity for a hearing.

(d) Even if no hearing is requested, NOAA may order a hearing if it will serve the interests of justice. This paragraph does not create any right to a hearing in addition to the right provided in paragraph (a) of this section.

SANCTIONS FOR NONPAYMENT OF PENALTIES

§ 904.310 Nature of sanctions.

(a) NOAA may suspend a permit if:

(1) A civil penalty has been assessed against the permit holder under Subparts B and C of this part, but the permit holder has failed to pay the penalty, or has defaulted on a payment agreement; or

(2) A criminal fine or other liability for violation of any of the statutes administered by NOAA has been imposed against the permit holder in a judicial proceeding, but payment has not been made.

(b) NOAA will suspend any permit issued to a foreign fishing vessel under section 204(b) of the Magnuson Fishery Conservation and Management Act under the circumstances set forth in paragraph (a) of this section.

(c) NOAA will withhold any other permit for which the permit holder applies if either condition in § 904.310(a) is applicable.

§ 904.311 Compliance.

If the permit holder pays the fine or penalty in full or agrees to terms satisfactory to NOAA for payment:

(a) The suspension will not take effect;

(b) Any permit suspended under § 904.310 will be reinstated by affirmative order of NOAA; or

(c) Any application by the permit holder may be granted if the permit holder is otherwise qualified to receive the permit.

SANCTIONS FOR VIOLATIONS

§ 904.320 Nature of sanctions.

Subject to the requirements of this subpart, NOAA may take any of the following actions or combination of actions if a permit holder or permitted vessel violates a statute administered by NOAA, or any regulation promulgated or permit condition prescribed thereunder:

(a) *Revocation.* A permit may be cancelled, with or without prejudice to issuance of the permit in the future. Additional requirements for issuance of any future permit may be imposed.

(b) *Suspension.* A permit may be suspended either for a specified period of time or until stated requirements are met, or both. If contingent on stated requirements being met, the suspension is with prejudice to issuance of any permit until the requirements are met.

(c) *Modification.* A permit may be modified, as by imposing additional conditions and restrictions. If the permit was issued for a foreign fishing vessel under section 204(b) of the Magnuson Fishery Conservation and Management Act, additional conditions and restrictions may be imposed on the application of the foreign nation involved and on any permits issued under such application.

§ 904.321 Reinstatement of permit.

(a) A permit suspended for a specified period of time will be reinstated automatically at the end of the period.

(b) A permit suspended until stated requirements are met will be reinstated only by affirmative order of NOAA.

§ 904.322 Interim action.

(a) To protect marine resources during the pendency of an action under this subpart, in cases of willfulness, or as otherwise required in the interest of public health, welfare, or safety, an Administrative Law Judge may order immediate suspension, modification, or withholding of a permit until a decision is made on the action proposed in a NOPS or NIDP.

(b) The Judge will order interim action under paragraph (a) of this section, only after finding that there exists probable cause to believe that the violation charged in the NOPS or NIDP was committed. The Judge's finding of probable cause, which will be summarized in the order, may be made:

(1) After review of the factual basis of the alleged violation, following an opportunity for the parties to submit their views (orally or in writing, in the Judge's discretion); or

(2) By adoption of an equivalent finding of probable cause or an admission in any administrative or judicial proceeding to which the recipient of the NOPS or NIDP was a party, including, but not limited to, a hearing to arrest or set bond for a vessel in a civil forfeiture action or an arraignment or other hearing in a criminal action. Adoption of a finding or admission under this paragraph may be made only after the Judge reviews pertinent portions of the transcript or other records, documents, or pleadings from the other proceeding.

(c) An order for interim action under paragraph (a) of this section is unappealable and will remain in effect until a decision is made on the NOPS or NIDP. Where such interim action has been taken, the Judge will expedite any hearing requested under § 904.304.

Subpart E—Written Warnings

§ 904.400 Purpose and scope.

This subpart sets forth the policy and procedures governing the issuance and use of written warnings by persons authorized to enforce the statutes administered by NOAA, and the review of such warnings. A written warning may be issued in lieu of assessing a civil penalty or initiating criminal prosecution for violation of any of the laws cited in § 904.1(c).

§ 904.401 Written warning as a prior offense.

A written warning may be used as a basis for dealing more severely with a subsequent offense, including, but not limited to, a violation of the same statute or an offense involving an activity that is related to the prior offense.

§ 904.402 Procedures.

(a) Any person authorized to enforce the laws listed in § 904.1(c) who finds a violation of one of the laws may issue a written warning to a violator in lieu of other law enforcement action that could be taken under the applicable statute.

(b) The written warning will:

(1) State that it is a "written warning";

(2) State the factual and statutory or regulatory basis for its issuance;

(3) Advise the violator of its effect in the event of a future violation; and

(4) Inform the violator of the right of review and appeal under § 904.403.

(c) NOAA will maintain a record of written warnings that are issued.

(d) If, within 120 days of the date of the written warning, further investigation indicates that the violation is more serious than realized at the time the written warning was issued, or that the violator previously committed a similar offense for which a written warning was issued or other enforcement action was taken, NOAA may withdraw the warning and commence other civil or criminal proceedings.

(e) For written warnings under the Magnuson Fishery Conservation and Management Act or the Northern Pacific Halibut Act of 1982, the enforcement officer will note the warning, its date, and reason for its issuance on the permit, if any, of the vessel used in the violation. If noting the warning on the permit of the vessel is impracticable, notice of the written warning will be served personally, or by registered or certified mail, return receipt requested, on the vessel's owner, operator, or designated agent for service of process, and such service will be deemed notation on the permit.

§ 904.403 Review and appeal of a written warning.

(a) If a person receives a written warning from an enforcement agent, the person may, within 90 days of receipt of the written warning, seek review by the appropriate NOAA Regional Attorney. The request must be in writing and must present the facts and circumstances that explain or deny the violation described in the warning. The Regional Attorney will review the information and notify the person of his or her decision.

(b) If a person receives a written warning from a Regional Attorney or staff attorney, or receives a decision from a Regional Attorney affirming a written warning, the person may appeal the warning or decision to the NOAA Assistant General Counsel for Enforcement and Litigation. The appeal must be brought within 30 days of receipt of the warning or decision from the Regional Attorney. The Assistant General Counsel for Enforcement and Litigation may, in his or her discretion, affirm, expunge, or modify the written warning and will notify the person of the decision. The decision constitutes the final agency action.

(c) The addresses of the NOAA Regional Attorneys are:

Regional Counsel, Office of General Counsel, NOAA, 14 Elm Street, Federal Building, Gloucester, MA 01930

Regional Counsel, Office of General Counsel, NOAA, 9450 Koger Blvd., Suite 102, St. Petersburg, FL 33702

Regional Counsel, Office of General Counsel, NOAA, Bin C15700, 7600 Sandpoint Way, NE., Seattle, WA 98115

Regional Counsel, Office of General Counsel, NOAA, 300 South Ferry Street, Room 2013, Terminal Island, CA 90731

Regional Counsel, Office of General Counsel, NOAA, P.O. Box 1668, Juneau, AK 99802

The address of the Assistant General Counsel for Enforcement and Litigation is 1825 Connecticut Avenue NW., Suite 607, Washington, DC 20235.

Subpart F—Seizure and Forfeiture Procedures

§ 904.500 Purpose and scope.

(a) This subpart sets forth procedures governing the release or forfeiture of seized property (except property seized and held solely as evidence) that is subject to forfeiture under the various statutes administered by NOAA.

(b) Except as provided in this subpart, these regulations apply to all seized property subject to forfeiture under the statutes listed in Subpart A. This subpart is in addition to, and not in contradiction of, any special rules regarding seizure, holding or disposition of property seized under these statutes.

§ 904.501 Notice of seizure.

Except where the owner, consignee, or other party that the facts of record indicate has an interest in the seized property is personally notified, or where seizure is made under a search warrant, NOAA will, as soon as practicable following the seizure or other receipt of seized property, mail notice of the seizure by registered or certified mail, return receipt requested, to the owner or consignee, if known or easily ascertainable, or other party that the facts of record indicate has an interest in the seized property. The notice will describe the seized property and state the time, place and reason for the seizure. The notice will inform each interested party of his or her right to apply for remission or mitigation of the forfeiture (including any agreement that may be required under § 904.506(b)(2)(vii)). The notice may be combined with a notice of the sale of perishable fish issued under § 904.505.

§ 904.502 Bonded release.

NOAA may, in its sole discretion, release any seized property upon deposit with NOAA of the full value of the property or such lesser amount as NOAA deems sufficient to protect the interests served by the applicable statute. The deposit will be held in a NOAA suspense account, or deposited with the appropriate court, pending the outcome of forfeiture proceedings. In addition, NOAA may, in its sole discretion, accept a bond or other security in place of fish, wildlife, or other property seized. The bond will contain such conditions as NOAA deems appropriate. The provisions of § 904.506(f) apply to NOAA's determination whether to release the property. The deposit or bond will for all purposes be considered to represent the property seized and subject to forfeiture.

§ 904.503 Appraisement.

NOAA will appraise seized property to determine its domestic value. Domestic value means the price at which such or similar property is offered for sale at the time and place of appraisement in the ordinary course of trade. If there is no market for the seized property at the place of appraisement, the value in the principal market nearest the place of appraisement will be used. If the seized property may not lawfully be sold in the United States, its domestic value will be determined by other reasonable means.

§ 904.504 Administrative forfeiture proceedings.

(a) *When authorized.* This section applies to property that is determined under § 904.503 to have a value of $100,000 or less, and that is subject to administrative forfeiture under the applicable statute. This section does not apply to conveyances seized in connection with criminal proceedings.

(b) *Procedure.* (1) NOAA will publish a notice of proposed forfeiture once a week for at least three successive weeks in a newspaper of general circulation in the Federal judicial district in which the property was seized. However, if the value of the seized property does not exceed $1,000, the notice may be published by posting for at least three successive weeks in a conspicuous place accessible to the public at the National Marine Fisheries Service Enforcement Office, United States District Court, or the United States Customs House nearest the place of seizure, with the date of posting indicated on the notice. In addition, a reasonable effort will be made to serve the notice personally, or by registered or certified mail, return receipt requested, on each person whose whereabouts and interest in the property are known or easily ascertainable.

(2) The notice of proposed forfeiture will:

(i) Describe the seized property, including any applicable registration or serial numbers;

(ii) State the time, place and reason for the seizure; and

(iii) Describe the rights of an interested person to file a claim to the property (including the right to file a motion to stay administrative forfeiture proceedings and to petition to remit or mitigate the forfeiture).

(3)(i) Except as provided in paragraph (b)(4) of this section, any person claiming the seized property may file a claim with NOAA, at the address indicated in the notice, within 20 days of the date the notice was first published or posted. The claim must state the claimant's interest in the property.

(ii) Except as provided in paragraph (b)(3)(v) or (b)(4) of this section, a bond for costs in the penal sum of $5,000 or 10 per cent of the appraised value of the property, whichever is lower, but not less than $250, with sureties satisfactory to the Administrator, must be filed with the claim for seized property. The bond may be posted on Customs form 4615 or a similar form provided by NOAA. There must be endorsed on the bond a list or schedule in substantially the following form, signed by the claimant in the presence of witnesses, and attested by the witnesses:

List or schedule containing a particular description of seized article, claim for which is covered by the within bond; to wit:

____

____

The foregoing list is correct.

____

Claimant

Attest:

____

____

A certified check may be substituted for a bond.

(iii) Filing a claim and posting a bond does not entitle the claimant to possession of the property. However, it does stop administrative forfeiture proceedings.

(iv) If the claim and bond are filed timely in accordance with this section, NOAA will refer the matter to the Attorney General to institute forfeiture proceedings in the appropriate United States District Court.

(v) Upon satisfactory proof of financial inability to post the bond, NOAA may waive the bond requirement for any person claiming an interest in the seized property.

(4) Instead of, or in addition to, filing a claim and bond under paragraph (b)(3) of this section, any person claiming the seized property may file with NOAA within 20 days after the date of first publication or posting of the notice of proposed forfeiture, a motion to stay administrative forfeiture proceedings. The motion must contain:

(i) The claimant's verified statement showing the claimant's absolute title to the seized property, free of all liens or other third party interests; and

(ii) The claimant's offer to pay in advance all reasonable costs anticipated for storage and maintenance of the property. NOAA, in its discretion, may grant the stay and impose any conditions deemed reasonable, including but not limited to length of the stay, factors that would automatically terminate the stay, and any requirement for a bond to secure payment of storage or maintenance costs. If NOAA denies or terminates the stay, the claimant, if he or she has not already done so, has 20 days from receipt of the denial or termination order to file a claim and bond in accordance with paragraph (b)(3) of this section. Failure to file the claim and bond within that 20 days will result in summary forfeiture under paragraph (b)(5) of this section.

(5) If a claim and bond are not filed within 20 days of notice in accordance with this section, or if a motion for a stay under paragraph (b)(4) is pending, NOAA will declare the property forfeited. The declaration of forfeiture will be in writing and will be served on each person whose whereabouts and prior interest in the seized property are known or easily ascertainable. The forfeited property will be subject to

disposition as authorized by law and regulations of NOAA.

(6) If the appraised value of the property is more than $100,000, or a timely and satisfactory claim and bond for property appraised at $100,000 or less are submitted to NOAA, the matter will be referred to the Attorney General to institute *in rem* proceedings in the appropriate United States District Court.

§ 904.505 Summary sale.

(a) In view of the perishable nature of fish, any person authorized to enforce a statute administered by NOAA may, as authorized by law, sell or cause to be sold, and any person may purchase, for not less than its domestic fair market value, fish seized under such statute.

(b) Any person purchasing fish subject to this section must deliver the proceeds of the sale to a person authorized to enforce a statute administered by NOAA immediately upon request of such authorized person. Anyone who does not so deliver the proceeds may be subject to penalties under the applicable statute or statutes.

(c) NOAA will give notice of the sale by registered or certified mail, return receipt requested, to the owner or consignee, if known or easily ascertainable, or to any other party that the facts of record indicate has an interest in the seized fish, unless the owner or consignee or other interested party has otherwise been personally notified. Notice will be sent either prior to the sale, or as soon thereafter as practicable.

(d) The proceeds of the sale, after deducting any reasonable costs of the sale, will be subject to any administrative or judicial proceedings in the safe manner as the seized fish would have been, including an action *in rem* for the forfeiture of the proceeds. Pending disposition of such proceedings, the proceeds will, as appropriate, either be deposited in a NOAA suspense account or submitted to the appropriate court. The proceeds will not be subject to release under § 904.502 or § 904.506(f).

(e) Seizure and sale of fish is without prejudice to any other remedy or sanction authorized by law.

§ 904.506 Remission and mitigation of forfeiture.

(a) *Application of this section.* (1) This section establishes procedures for filing with NOAA a petition for relief from forfeitures incurred, or alleged to have been incurred, under any statute administered by NOAA that authorizes the remission or mitigation of forfeitures.

(2) Although NOAA may properly consider a petition for relief from forfeiture along with other consequences of a violation, the remission or mitigation of a forfeiture is not dispositive of any criminal charge filed, civil penalty assessed, or permit sanction proposed, unless NOAA expressly so states. Remission or mitigation of a forfeiture is in the nature of executive clemency and is granted in the sole discretion of NOAA only when consistent with the purposes of the particular statute involved and this section.

(3) NOAA will not consider a petition for remission or mitigation while a forfeiture proceeding is pending in federal court. Once such a case is referred to the Attorney General for institution of judicial proceedings, and until the proceedings are completed, any petition received by NOAA will be forwarded to the Attorney General for consideration.

(b) *Petition for relief from forfeiture.* (1) Any person having an interest in property seized and subject to forfeiture may file a petition for relief from forfeiture. Unless otherwise directed in a notice concerning the seized property, the petition shall be addressed to NOAA and filed with the Regional Attorney nearest to the place where the property is held (addresses in § 904.403(c)). NOAA will consider a petition filed after a declaration or decree of forfeiture only if the petitioner demonstrates that he or she did not previously know of the seizure and was in such circumstances as prevented him or her from knowing of it, except that NOAA will not consider a petition filed more than three months from the date of such declaration or decree. (See § 904.507 regarding the right of certain claimants to petition for restoration of proceeds from the sale of forfeited property.)

(2) The petition need not be in any particular form, but must set forth the following:

(i) A description of the property seized;

(ii) The date and place of the seizure;

(iii) The petitioner's interest in the property, supported as appropriate by bills of sale, contracts, mortgages, or other satisfactory evidence;

(iv) The facts and circumstances relied upon by the petitioner to justify the remission or mitigation;

(v) Any request for release under paragraph (f) of this section pending final decision on the petition, together with any offer of payment to protect the United States' interest that petitioner makes in return for the release, and the facts and circumstances relied upon by petitioner in the request;

(vi) The signature of the petitioner, his or her attorney, or other authorized agent; and

(vii) An express agreement to defer administrative or judicial forfeiture proceedings until completion of all other related judicial or administrative proceedings (including any associated civil penalty or permit sanction proceedings).

A false statement in a petition will subject petitioner to prosecution under 18 U.S.C. 1001.

(c) *Investigation.* NOAA will investigate the facts and circumstances shown by the petition and seizure, and may in this respect appoint an investigator to examine the facts and prepare a report of investigation.

(d) *Decision on petition.* (1) After investigation under paragraph (c) of this section, NOAA will decide the matter and notify the petitioner. NOAA may remit or mitigate the forfeiture, on such terms and conditions as under the applicable statute and the circumstances are deemed reasonable and just, upon a finding:

(i) That the forfeiture was incurred without willful negligence and without any intention on the part of petitioner to violate the applicable statute; or

(ii) That other circumstances exist that justify remission or mitigation of the forfeiture.

(2) Unless NOAA determines no valid purpose would be served, NOAA will condition a decision to remit or mitigate a forfeiture upon the petitioner's submitting an agreement, in a form satisfactory to NOAA, to hold the United States and its officers or agents harmless from any and all claims based on loss of or damage to the seized property or that might result from grant of remission or mitigation. If the petitioner is not the beneficial owner of the property, or if there are others with a proprietary interest in the property, NOAA may require the petitioner to submit such an agreement executed by the beneficial owner or other interested party. NOAA may also require that the property be promptly exported from the United States.

(e) *Compliance with the decision.* A decision by NOAA to remit or mitigate the forfeiture upon stated conditions, as upon payment of a specified amount, will be effective for 60 days after the date of the decision. If the petitioner does not comply with the conditions within that period in the manner prescribed by the decision, or make arrangements satisfactory to NOAA for later compliance, the remission or mitigation will be void, and judicial or administrative forfeiture proceedings will be instituted or resumed.

(f) *Release of seized property pending decision.* (1) Upon request in the petition for relief from forfeiture, NOAA may in its discretion order the release, pending final decision on the petition, of all or part of the seized property upon payment by the petitioner of the full value of the property to be released or such lesser amount as NOAA deems sufficient to protect the interests served by the applicable statute. The following, however, will not be released:

(i) Property in which NOAA is not satisfied that the petitioner has a substantial interest;

(ii) Property whose entry into the commerce of the United States is prohibited;

(iii) Live animals, except in the interest of the animals' welfare;

(iv) Proceeds from the sale of seized property sold under § 904.505 (see § 904.507 regarding petitions for restoration of proceeds from the sale of property declared forfeited); or

(v) Property whose release appears to NOAA not to be in the best interest of the United States or serve the purposes of the applicable statute.

(2) If NOAA grants the request, the amount paid by the petitioner will be deposited in a NOAA suspense account. The amount so deposited will for all purposes be considered to represent the property seized and subject to forfeiture, and payment of the amount by petitioner constitutes a waiver by the petitioner of any claim arising from the seizure and custody of the property. NOAA will maintain the money so deposited pending further order of NOAA, order of a court, or disposition by applicable administrative proceedings.

§ 904.507 Petition for restoration of proceeds.

(a) The general provisions of § 904.506 on petitions for remission or mitigation of forfeitures apply to petitions for restoration of proceeds from the sale of forfeited property, except as modified by this section.

(b) In addition to any evidence required under § 904.506, the petition for restoration of proceeds must be supported by satisfactory proof that the petitioner did not know of the seizure prior to the declaration or decree of forfeiture and was in such circumstances as prevented him or her from knowing of it.

(c) If forfeited property that is the subject of a claim for restoration of proceeds has been appropriated for official use, retention by the government will be regarded as sale for the purposes of this section.

(d) No petition for restoration of proceeds will be considered unless it is submitted within three months of the declaration or decree of forfeiture.

(e) If no petition is timely filed, or if the petition is denied, prior to depositing the proceeds NOAA may use the proceeds of sale to reimburse the government for any costs that by law may be recovered or to pay any reward that by law may be paid from such sums.

§ 904.508 Recovery of certain storage costs.

If any fish, wildlife, or evidentiary item is seized and forfeited under the Endangered Species Act, 16 U.S.C. 1531 through 1543, any person whose act or omission was the basis for the seizure may be charged a reasonable fee for expenses to the United States connected with the transfer, board, handling or storage of such property. If any fish or wildlife is seized in connection with a violation of the Lacey Act Amendments of 1981, 16 U.S.C. 3371 through 3378, or any property is seized in connection with a violation of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1801 through 1882, any person convicted thereof, or assessed a civil penalty therefor, may be assessed a reasonable fee for expenses of the United States connected with the storage, care and maintenance of such property. Within a reasonable time after forfeiture, NOAA will send to such person by registered or certified mail, return receipt requested, a bill for such fee. The bill will contain an itemized statement of the applicable costs, and instructions on the time and manner of payment. Payment must be made in accordance with the bill. If the recipient of the bill objects to the reasonableness of the costs assessed he or she may, within 30 days of receipt, file written objections with NOAA at the address stated in the bill. NOAA will promptly review the written objections and within 30 days mail the final decision to the party who filed them. NOAA's decision will constitute final agency action on the matter.

§ 904.509 Abandonment.

(a) The owner of a seized item may abandon it to NOAA by various means, including, but not limited to, expressly waiving any claim to the item, refusing or otherwise avoiding delivery of mail concerning the seizure (as by giving a false name or address), or failing for more than 180 days to make or maintain a claim to the item.

(b) The owner of a seized item waives a claim to it by failing to respond within 120 days of issuance of a Government notice concerning the seizure, or by voluntarily relinquishing any interest in an item by written agreement, or otherwise.

(c) An item will be declared finally abandoned, without recourse, upon a finding of abandonment.

§ 904.510 Disposal of forfeited or abandoned items.

(a) *Delivery to Administrator.* Upon forfeiture of any fish, wildlife, parts or products thereof, or other property to the United States, or the abandonment or waiver of any claim to any such property, it will be delivered to NOAA for storage or disposal according to the provisions of this section.

(b) *Purposes of disposal.* Disposal procedures may be used to alleviate overcrowding of evidence storage facilities, and to avoid the accumulation of seized items where disposal is not otherwise accomplished by court order, as well as to address the needs of governmental agencies and other institutions and organizations for such items for scientific, educational, and public display purposes. In no case will items be used for personal purposes, either by loan recipients or government personnel.

(c) *Disposal of evidence.* Items that are evidence may be disposed of only after authorization by the NOAA Office of General Counsel. Disposal approval usually will not be given until the case involving the evidence is closed, except that perishable items may be authorized for disposal sooner.

(d) *Loans*—(1) *To institutions.* Items approved for disposal may be loaned to institutions or organizations requesting such items for scientific, educational, or public display purposes. Items will be loaned only after execution of a loan agreement which provides, among other things, that the loaned items will be used only for noncommercial scientific, educational, or public display purposes, and that they will remain the property of the United States government, which may demand their return at any time. Parties requesting the loan of an item must demonstrate the ability to provide adequate care and security for the item. Loans may be made to responsible agencies of foreign governments in accordance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

(2) *To individuals.* Items generally will not be loaned to individuals not affiliated with an institution or organization unless it is clear that the items will be used in a noncommercial manner, and for scientific, educational, or public display purposes which are in the public interest.

(3) *Selection of loan recipients.* Recipients of items will be chosen so as to assure a wide distribution of the items throughout the scientific, educational, public display and museum communities. Other branches of NMFS, NOAA, the Department of Commerce, and other governmental agencies will have the right of first refusal of any item offered for disposal. The Administrator may solicit applications, by publication of a notice in the FEDERAL REGISTER, from qualified persons, institutions, and organizations who are interested in obtaining the property being offered. Such notice will contain a statement as to the availability of specific items for which transferees are being sought, and instructions on how and where to make application. Applications will be granted in the following order: Other offices of NMFS, NOAA, and the Department of Commerce; U.S. Fish and Wildlife Service; other Federal agencies; other governmental agencies; scientific, educational, or other public or private institutions; and private individuals.

(4) *Loan agreement.* Items will be transferred under a loan agreement executed by the Administrator and the borrower. Any attempt on the part of the borrower to retransfer an item, even to another institution for related purposes, will violate and invalidate the loan agreement, and entitle the United States to immediate repossession of the item, unless the prior approval of the Administrator has been obtained under § 904.510(d)(5). Violation of the loan agreement may also subject the violator to the penalties provided by the laws governing possession and transfer of the item.

(5) *Temporary reloans; documents to accompany items.* Temporary reloans by the borrower to another qualified

borrower (as for temporary exhibition) may be made if the Administrator is advised in advance by the borrowers. Temporary loans for more than thirty days must be approved in advance in writing by the Administrator. A copy of the original loan agreement, and a copy of the written approval for reloan, if any, must accompany the item whenever it is temporarily reloaned or is shipped or transported across state or international boundaries.

(e) *Destruction of items.* This paragraph and other provisions relating to the destruction of property apply to items:

(1) Which have not been handicrafted, or

(2) Which have been handicrafted and are of less than one hundred dollars ($100) value, and

(3) For which no acceptable applications have been received, or for which publication in the FEDERAL REGISTER of the availability of similar items in the past has resulted in the receipt of no applications. Such items may be destroyed if they have been in government ownership for more than one year. Perishable items which are not fit for human consumption may be destroyed sooner, if the authorization required by § 904.510(c) has been obtained. Destruction of items will be witnessed by two persons, one of whom may be the disposing officer.

(f) *Food items.* Food items will, if possible, be disposed of by gift to nonprofit groups providing public welfare food services.

(g) *Record-keeping.* A "fish and wildlife disposal" form will be completed each time an item is disposed of pursuant to the policy and procedure established herein, and will be retained in the case file for the item. These forms will be available to the public.

PART 906—INTERNATIONAL AFFAIRS

Sec.
906.1 International training.
906.2 Foreign visitors.

§ 906.1 International training.

(a) NOAA provides training in its disciplines for representatives from various developing countries throughout the world. Those trained consist of the recipients of fellowships awarded by the United Nations and its Specialized Agencies; and the recipients of training awards from the Agency for International Development (AID), the Military Assistance Program (MAP), and under bilateral agreements arranged by the Department of State in cooperation with the participating foreign governments.

(b) Requests are received from the sponsors to provide training in the scientific and technical functions of NOAA, through individual training and/or through enrollment in recurring group courses. In individual or group training, the study program or course description is forwarded to the sponsor with the estimate cost or tuition fee and the amount of funds required for travel within the United States. Upon approval of the training program and the cost estimate, the sponsor informs the recipient of his acceptance and the date to begin training.

(c) Further information concerning eligibility of foreign nationals for training, course availability, course content, trainee qualifications, costs, funding, and other related information is available from the Director, International Affairs (IA), National Oceanic and Atmospheric Administration, Rockville, Md. 20852.

(Sec. 3, 26 Stat. 653, secs. 4-6, 61 Stat. 788, R.S. 4685; 15 U.S.C. 313, 22 U.S.C. 501, 33 U.S.C. 883d-883f, 884)

[32 FR 16257, Nov. 29, 1967; 35 FR 19249, Dec. 19, 1970]

§ 906.2 Foreign visitors.

(a) NOAA has been designated sponsor of an English-Visitor Program in accordance with the administrative regulations issued under the Mutual Educational and Cultural Exchange Act of 1961. The program is identified as Exchange-Visitor Program No. G-V-228, and has an official description as follows: "A program to provide training and research opportunities at the Administration's facilities in various parts of the United States, for qualified foreign specialists, as a measure to increase international rapport among those interested in the development of the environmental sciences, and to promote the general interests of international exchange."

(b) In addition to the Exchange-Visitor Program described in paragraph (a) of this section, NOAA also accepts other visitors from various countries having a mutual interest with the United States in the environmental sciences. The duration of these visits extends from 1 to 10 days. Programs are arranged in accordance with the specific interests of the visitors and may include orientation, review, and consultation on: Organizational structure; operating methods; equipment and instrumentation; scientific and technical procedures; research; or exchange of ideas.

(c) Further information concerning international visits is available from the Director, International Affairs (IA), National Oceanic and Atmospheric Administration, Rockville, Md. 20852.

(Sec. 3, 26 Stat. 653, secs. 4-6, 61 Stat. 788, R.S. 4685; 15 U.S.C. 313, 22 U.S.C. 501, 33 U.S.C. 883d-883f, 884)

[32 FR 16257, Nov. 29, 1967; 35 FR 19249, Dec. 19, 1970]

PART 907—ENVIRONMENTAL INFORMATION

§ 907.1 Environmental information.

(a) NOAA gathers, processes, and issues information on weather conditions, river water height, coastal tides and current, movement of ocean currents, structure and shape of ocean basins, seismic activity, the precise size and shape of the earth, and conditions of the upper atmosphere and space. It issues warnings against hurricanes, tornadoes, floods, and seismic seawaves to areas in danger.

(b) NOAA information falls into three broad categories, namely:

(1) Current information and warnings on the dynamic or continually changing aspects of the environment, such as the weather and other geophysical phenomena.

(2) Longer term information, such as navigation charts, compilations or summaries of historical environmental data, and earth and ocean surveys and measurements.

(3) Scientific and technical research publications dealing with the earth sciences.

(c) NOAA information is available in many forms and from many sources throughout NOAA.

(1) Current information is disseminated in the form of forecasts, advisories, and warnings, directly by the local offices of NOAA, of which there are approximately 350, or through relaying intermediaries, such as radio and TV stations and telephone recorders. The address of local NOAA offices can be obtained by consulting local phone directories, generally under the heading of Commerce Department—National Oceanic and Atmospheric Administration. The prime medium for disseminating weather information for the United States is the Daily Weather Map, which is available on a subscription basis. There is also published a Weekly Weather and Crop Bulletin, which narrates on a weekly basis the weather conditions and crop progress during the reporting period, generally on a State-by-State basis. Both the Daily Weather Map and the Weekly Weather and Crop Bulletin may be ordered from the Superintendent of Documents, Washington, DC 20402.

(2) Longer term information is available in various forms, such as charts, maps, books, and pamphlets, tabulations, individual data sheets, reproductions of original graphic recordings, and aerial photographs. These are available at varying prices, from various offices within NOAA. Also navigation charts may be purchased from contract sales agents, generally airport and marina operators. Catalogs or price lists of items in this category are available on request. Navigation chart catalogs are available from the Chief, Distribution Division (C44), NOAA, Rockville, Md. 20852. Price lists of climatological data, geophysical data, and geodetic data are available from the Director, Office of Data Information (D4), NOAA, Silver Spring, Md. 20910. Requests or inquiries concerning other information in the longer term category, but excluding scientific and technical research publications, may be sent to the Chief, Administra-

tive Controls Branch (AD14), NOAA, Rockville, Md. 20852, for referral to the responsible office.

(3) Scientific and technical research publications are disseminated in the form of printed journals, monographs, reports, and other paperbound publications. These range over the broad spectrum of the physical environment. Details concerning publications available and the prices may be obtained from the Chief, Scientific Information and Documentation Division (AD7), NOAA Rockville, Md. 20852. Many of NOAA's scientific and technical research publications are sold by the Clearinghouse for Federal Scientific and Technical Information, Springfield, Va. 22151, and by the Superintendent of Documents, Washington, DC 20402. Additional details concerning NOAA's scientific and technical publications are given in Appendix B of the U.S. Government Organization Manual, published annually.

(Reorganization Plan No. 2 of 1965, 5 U.S.C. App. 133z–15 note)

[32 FR 16257, Nov. 29, 1967, as amended at 35 FR 19247, Dec. 19, 1970]

PART 908—MAINTAINING RECORDS AND SUBMITTING REPORTS ON WEATHER MODIFICATION ACTIVITIES

Sec.
908.1 Definitions.
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908.21 Report form.

AUTHORITY: Pub. L. 92-305, 85 Stat. 735, December 18, 1971.

SOURCE: 41 FR 23394, June 10, 1976, unless otherwise noted.

§ 908.1 Definitions.

As used in this part, terms shall have the meaning ascribed in this section.

(a) *Administrator.* The Administrator of the National Oceanic and Atmospheric Administration.

(b) *Person.* Any individual, corporation, company, association, firm, partnership, society, joint stock company, any State or local government or any agency thereof, or any other organization, whether commercial or nonprofit, except where acting solely as an employee, agent, or independent contractor of the Federal government.

(c) *Weather modification activity.* Any activity performed with the intention of producing artificial changes in the composition, behavior, or dynamics of the atmosphere.

(d) *United States.* The several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or insular possession of the United States.

(e) *Persons whose activities relate to weather modification.* Persons engaged in weather modification activities or engaged in the distribution or sale of weather modification apparatus or materials known by them to be destined for use in weather modification activities.

(f) *Project.* A related series of weather modification activities having a common objective.

(g) *Target area.* The ground area within which the effects of the weather modification activity are expected to be found.

(h) *Control area.* A preselected, untreated ground area used for comparison with a target area.

(i) *Weather modification apparatus.* Any apparatus used with the intention of producing artificial changes in the composition, behavior, or dynamics of the atmosphere. For example: Seeding generators, propane devices, flares, rockets, artillery projectiles, jet engines, etc.

(j) *Sponsor.* The primary person for whom the weather modification activity is performed.

(k) *Operator.* The person who is primarily responsible for carrying out the weather modification activity.

[41 FR 23394, June 10, 1976, as amended at 46 FR 32233, June 22, 1981]

§ 908.2 Persons subject to reporting.

Any person engaged or intending to engage in any weather modification activity in the United States shall be subject to the reporting provisions of this part.

§ 908.3 Activities subject to reporting.

(a) The following, when conducted as weather modification activities, shall be subject to reporting:

(1) Seeding or dispersing of any substance into clouds or fog, to alter drop size distribution, produce ice crystals or coagulation of droplets, alter the development of hail or lightning, or influence in any way the natural development cycle of clouds or their environment;

(2) Using fires or heat sources to influence convective circulation or to evaporate fog;

(3) Modifying the solar radiation exchange of the earth or clouds, through the release of gases, dusts, liquids, or aerosols into the atmosphere;

(4) Modifying the characteristics of land or water surfaces by dusting or treating with powders, liquid sprays, dyes, or other materials;

(5) Releasing electrically charged or radioactive particles, or ions, into the atmosphere;

(6) Applying shock waves, sonic energy sources, or other explosive or acoustic sources to the atmosphere;

(7) Using aircraft propeller downwash, jet wash, or other sources of artificial wind generation; or

(8) Using lasers or other sources of electromagnetic radiation.

(b) In addition to the activities listed above, other similar activities falling within the definition of weather modification as set forth in § 908.1 are also subject to reporting.

(c) The requirement for reporting shall not apply to activities of a purely local nature that can reasonably be expected not to modify the weather outside of the area of operation. This exception is presently restricted to the use of lightning deflection or static discharge devices in aircraft, boats, or buildings, and to the use of small heat sources, fans, fogging devices, aircraft downwash, or sprays to prevent the occurrence of frost in tracts or fields planted with crops susceptible to frost or freeze damage. Also expected from the requirement for reporting are religious activities or other ceremonies, rites and rituals intended to modify the weather.

(d) All activities noted in paragraphs (a) and (b) of this section are subject to initial reporting. However, after the Administrator has received initial notification of a planned activity, he may waive some of the subsequent reporting requirements. This decision to waive certain reporting requirements will be based on the general acceptability, from a technical or scientific viewpoint, of the apparatus and techniques to be used.

(e) Other reporting exceptions may be made in the future by rule of the Administrator.

§ 908.4 Initial report.

(a) Any person intending to engage in any weather modification project or activity in the United States shall provide a report of his intention, to be received by the Administrator at least 10 days before the commencement of such project or activity. This report shall contain at least the following:

(1) The designation, if any, used by the operator for the project or activity;

(2) The following dates for weather modification activities:

(i) The date the first actual weather modification activity is to be undertaken;

(ii) The date on which the final modification activity is expected to occur;

(3) The following information on persons involved with the project or activity:

(i) The name, affiliation, and address of the sponsor;

(ii) The name, affiliation, and address of the operator;

(4) The purpose of the project or activity;

(5) A map showing the approximate size and location of the target and control areas, and the location of each item of ground-based weather modification apparatus, precipitation measuring device, and, for airborne operations, the airport;

(6) A description of the weather modification apparatus, modification agents, and the techniques to be employed;

(7) The name and address of the responsible individual from whom log books or other records of the project or activity may be obtained;

(8) Answers to the following questions on project safeguards:

(i) Has an Environmental Impact Statement, Federal or State, been filed: Yes—— No ——. If Yes, please furnish a copy as applicable.

(ii) Have provisions been made to acquire the latest forecasts, advisories, warnings, etc. of the National Weather Service, Forest Service, or others when issued prior to and during operations? Yes —— No ——. If Yes, please specify on a separate sheet.

(iii) Have any safety procedures (operational contraints, provisions for suspension of operations, monitoring methods, etc.) and any environmental guidelines (related to the possible effects of the operations) been included in the operational plans? Yes —— No ——. If Yes, please furnish copies or a description of the specific procedures and guidelines; and

(9) Optional remarks, to include any additional items which the person deems significant or of interest and such other information as the Administrator may request the person to submit.

(b) If circumstances prevent the signing of a contract or agreement to perform, or receipt of an authorization to proceed with, a weather modification activity at a date early enough to comply with paragraph (a) of this section, the initial report shall be provided so as to be received by the Administrator within 10 days of the date of signing of the contract or agreement, or receipt of authorization to proceed. In such cases, the report shall be accompanied by an explanation as to why it was not submitted at least 10 days prior to the commencement of the activity.

(c) In the event that circumstances beyond the control of the person liable to report under these regulations prevent the submission of the initial report in a timely manner as described above, the report shall be forwarded as early as possible, accompanied by an explanation as to why a timely report has not been provided. If such explanation is deemed adequate, the Administrator will consider the report as timely filed.

§ 908.5 Interim reports.

(a) Any person engaged in a weather modification project or activity in the United States on January 1 in any year shall submit to the Administrator, not later than 45 days thereafter, an interim report setting forth as of such date the information required below with respect to any such continuing project or activity not previously furnished to the Administrator in a prior interim report; provided that the January 1 date shall not apply if other arrangements have previously been made with the written approval of the Administrator.

(b) The interim report shall include the file number assigned by the Administrator and shall provide a summary of the project or activity containing at least the following information for each month:

(1) Number of days on which actual modification activities took place;

(2) Number of days on which weather modification activities were conducted, segregated by each of the major purposes of the activities;

(3) Total number of hours of operation of each type of weather modification apparatus (i.e., net hours of agent release);

(4) Total amount of agent used. If more than one agent was used, each should be totaled separately (e.g., carbon dioxide, sodium chloride, urea, silver iodide).

(c) The totals for the items in paragraph (b) of this section shall be provided for the period covered by the interim report.

[41 FR 23394, June 10, 1976, as amended at 46 FR 32233, June 22, 1981]

§ 908.6 Final report.

Upon completion of a weather modification project or activity the person who performed the same shall submit a report to the Administrator not later than 45 days after completion of the project or activity. The report shall include the file number assigned by the Administrator and the following items:

(a) Information required for the interim reports (to the extent not previously reported).

(b) The total number of days on which actual modification activities took place during the project or activity.

(c) The total number of days during the project or activity on which weather modification activities were conducted, segregated by each of the major purposes of the activities.

(d) The total number of hours of operation of each type of weather modification apparatus during the project or activity (i.e., net hours of agent release).

(e) The total amount of modification agent(s) dispensed during the project or activity. If more than one agent was used, each should be totaled separately (e.g., carbon dioxide, sodium chloride, urea, silver iodide).

(f) The date on which the final weather modification activity occurred.

[41 FR 23394, June 10, 1976, as amended at 46 FR 32233, June 22, 1981]

§ 908.7 Supplemental reports.

Notwithstanding other regulations, a supplemental report in letter form referring to the appropriate NOAA file number, if assigned, must be made to the Administrator immediately if any report of weather modification activities submitted under § 908.4, § 908.5, or § 908.6 is found to contain any material inaccuracies, misstatements, and omissions. A supplemental report must also be made if there are changes in plans for the project or activity.

§ 908.8 Maintenance of records.

(a) Any person engaging in a weather modification activity in the United States shall maintain a record of such activity. This record shall contain at least the following, when applicable:

(1) A chronological record of activities carried on, preferably in the form of a daily log, which shall include the NOAA file number assigned to the project, the designation of each unit of weather modification apparatus, and at least the following information for each unit:

(i) Date of the weather modification activity.

(ii) Position of each aircraft or location of each item of weather modification apparatus during each modification mission. Maps may be used.

(iii) Time when weather modification activity began and ended.

(iv) Total duration of operation of each unit of weather modification apparatus (i.e., net hours of agent release).

(v) Type of each modification agent used.

(vi) Rate of dispersal of each agent during the period of actual operation of weather modification apparatus.

(vii) Total amount of agent used. If more than one agent was used, report total for each type separately.

(viii) Number of days on which weather modification activities were conducted, segregated by each of the major purposes of the activities.

(2) The monthly totals of hours of modification activity, the amount of modification agent used, and the number of days on which weather modification activities were conducted, segregated by each of the major purposes of the activities, shall be shown on the daily log sheet for the last day of each month.

(b) When the activity involves ground-based weather modification apparatus, records of the following shall also be maintained, when applicable, but need not be made part of the daily log:

(1) The location of each item of weather modification apparatus in use and its identification such as type and manufacturer's model number. If the apparatus is not commercially avail-

able, a brief description of the apparatus and the method of operation should be recorded.

(2) The name and address of the person responsible for operating each weather modification apparatus.

(3) The altitude and type of weather phenomenon subjected to weather modification activity during each operational period (e.g., cumulus clouds between 10,000 and 30,000 feet m.s.l.; ground fog).

(c) When the activity involves airborne weather modification apparatus, records of the following shall also be maintained, when applicable, but need not be made a part of the daily log: For each airborne weather modification apparatus run: Altitude, air speed; release points of modification agents, method of modification and characteristics of flares, rockets, or other delivery systems employed; temperature at release altitude; and, for aircraft: The type of aircraft, its identification number, the airport or airports used, and the names and addresses of crew members and the person responsible for operating the weather modification apparatus; and the altitude and type of weather phenomenon subjected to weather modification activity during each operational period (e.g., cumulus clouds between 10,000 and 30,000 feet m.s.l.; ground fog).

(d) The following records shall also be maintained, whenever applicable, but need not be made a part of the daily log. Only data specifically collected for the reported activity need be retained; data available from other sources need not be included.

(1) Any descriptions that were recorded of meteorological condiitons in target and control areas during the periods of operation; for example: Percent of cloud cover, temperature, humidity, the presence of lightning, hail, funnel clouds, heavy rain or snow, and unusual radar patterns.

(2) All measurements made of precipitation in target and control areas.

(3) Any unusual results.

§ 908.9 Retention of records.

Records required under § 908.8 shall be retained and available for inspection by the Administrator or his designated representatives for 3 years after completion of the activity to which they relate. Such records shall be required to be produced for inspection only at the place where normally kept. The Administrator shall have the right to make copies of such records, if he or she deems necessary.

[52 FR 4896, Feb. 18, 1987]

§ 908.10 Penalties.

Knowing and willful violation of any rule adopted under the authority of section 2 of Pub. L. 92-205 shall subject the person violating such rule to a fine of not more than $10,000, upon conviction thereof.

§ 908.11 Maintenance of records of related activities.

(a) Persons whose activities relate to weather modification activities, other than persons engaged in weather modification activities, shall maintain records concerning the identities of purchasers or users of weather modification apparatus or materials, the quantities or numbers of items purchased, and the times of such purchases. Such information shall be retained for at least 3 years.

(b) In addition, persons whose activities relate to weather modification shall be required, under the authority of section 4 of Pub. L. 92-205, to provide the Administrator, on his request, with information he deems necessary to carry out the purposes of this act.

[41 FR 23394, June 10, 1976, as amended at 52 FR 4896, Feb. 18, 1987]

§ 908.12 Public disclosure of information.

(a) Any records or other information obtained by the Administrator under these rules or otherwise under the authority of Pub. L. 92-205 shall be made publicly available to the fullest practicable extent. Such records or information may be inspected on written request to the Administrator. However, the Administrator will not disclose any information referred to in section 1905 of title 18, United States Code, and that is otherwise unavailable to the public, except that such information shall be disclosed:

(1) To other Federal government departments, agencies, and officials for official use upon request;

(2) In any judicial proceeding under a court order formulated to preserve the confidentiality of such information without impairing the proceeding; and

(3) To the public, if necessary to protect their health and safety.

(b) Certified copies of such reports and information, to the extent publicly disclosable, may be obtained from the Administrator at cost in accordance with the Department of Commerce implementation of the Freedom of Information Act.

(c) Persons reporting on weather modification projects or related activities shall specifically identify all information that they consider not to be subject to public disclosure under the terms of Pub. L. 92-205 and provide reasons in support thereof. A determination as to whether or not reported information is subject to public dissemination shall be made by the Administrator.

(d) When consideration of a weather modification activity report and related information indicates that a proposed project may significantly depart from the practices or procedures generally employed in similar circumstances to avoid danger to persons, property, or the environment, or indicates that success of Federal research projects may be adversely affected if the proposed project is carried out as described, the Administrator will notify the operator(s) and State officials of such possibility and make recommendations where appropriate. The purpose of such notification shall be to inform those notified of existing practices and procedures or Federal research projects known to NOAA. Notification or recommendation, or failure to notify or recommend, shall not be construed as approval or disapproval of a proposed project or as an indication that, if carried out as proposed or recommended it may, in any way, protect or endanger persons, property, or the environment or affect the success of any Federal research project. Any advisory notification issued by the Administrator shall be available to the public and be included in the pertinent activity report file.

§ 908.13 Address of letters.

Letters and other communications intended for the Administrator, in connection with weather modification reporting or activities, shall be addressed to: The Administrator, National Oceanic and Atmospheric Administration, Environmental Modification Office, Rockville, Md. 20852.

§ 908.14 Business to be transacted in writing.

All business transacted with the National Oceanic and Atmospheric Administration with regard to reports of weather modification activities should be transacted in writing. Actions of the National Oceanic and Atmospheric Administration will be based exclusively on the written record.

§ 908.15 Times for taking action; expiration on Saturday, Sunday, or holiday.

Whenever periods of time are specified in these rules in days, calendar days are intended. When the day, or the last day, fixed under these rules for taking any action falls on a Saturday, Sunday, or on a Federal holiday, the action may be taken on the next succeeding day which is not a Saturday, Sunday, or Federal holiday.

§ 908.16 Signature.

All reports filed with the National Oceanic and Atmospheric Administration must be dated and signed by or on behalf of the person conducting or intending to conduct the weather modification activities referred to therein by such person, individually or, in the case of a person other than an individual, by a partner, officer, or other person having corresponding functions and authority. For this purpose "officer" means a president, vice president, treasurer, secretary, or comptroller. Notwithstanding the foregoing, such reports may also be signed by the duly authorized agent or attorney of the person whose activities are being reported. Proof of such authorization shall be furnished to the Administrator when filing a report, unless previously furnished.

§ 908.17 Suspension or waiver of rules.

In an extraordinary situation, any requirement of these rules may be suspended or waived by the Administrator on request of the interested party, to the extent such waiver is consistent with the provisions of Pub. L. 92-205 and subject to such other requirements as may be imposed.

§ 908.18 Matters not specifically provided for in rules.

All matters not specifically provided for or situations not specifically addressed in these rules will be decided in accordance with the merits of each case by or under the authority of the Administrator, and such decision will be communicated in writing to all parties involved in the case.

§ 908.19 Publication of notice of proposed amendments.

Whenever required by law, and in other cases whenever practicable, notice of proposed amendments to these rules will be published in the FEDERAL REGISTER. If not published with the notice, copies of the text of proposed amendments will be furnished to any person requesting the same. All comments, suggestions, and briefs received within the time specified in the notice will be considered before adoption of the proposed amendments, which may be modified in the light thereof. Informal hearings may be held at the discretion of the Administrator.

§ 908.20 Effective date.

These rules are effective on June 10, 1976.

§ 908.21 Report form.

Pub. L. 92-205 and these rules should be studied carefully prior to reporting. Reports required by these rules shall be submitted on forms obtainable on request from the Administrator, or on an equivalent format.[1] In special situations, such alterations to the forms as the circumstances thereto may render necessary may be made, provided they do not depart from the requirements of these rules or of Pub. L. 92-205.

PART 909—POLICIES AND PROCEDURES REGARDING DISCLOSURE OF INFORMATION AND NOAA EMPLOYEE TESTIMONY IN LITIGATION NOT INVOLVING THE UNITED STATES

Sec.
909.1 Purpose and policy.
909.2 Disclosure and certification of information and records.
909.3 Response to subpena duces tecum.
909.4 Testimony by NOAA employees in litigation not involving the United States.
909.5 Conditions for authorizing testimony.

AUTHORITY: 15 U.S.C. 315, 1512, 1518; 33 U.S.C. 884; 43 U.S.C. 1458, 1460, 1461.

SOURCE: 43 FR 36240, Aug. 16, 1978, unless otherwise noted.

§ 909.1 Purpose and policy.

(a) The regulations in this part describe NOAA policies and procedures for the disclosure of information, records, and data to parties and testimony by NOAA employees in litigation not involving the United States.

(b) It is the policy of NOAA to provide information, data, and records to non-Federal litigants to the same extent that they are available to the general public. The availability of NOAA employees to testify in non-Federal litigation is governed by the NOAA policy of maintaining strict impartiality among non-Federal litigants. To this end NOAA witnesses generally may provide only factual testimony except as provided for in § 909.5(c) and shall not appear as expert witnesses in litigation not involving the United States.

§ 909.2 Disclosure and certification of information and records.

(a) Requests for identifiable information, records, and data in NOAA's possession will be complied with consistent with the NOAA freedom of information regulation (15 CFR Part 903), the Department of Commerce privacy regulations (15 CFR Part 4b), and 15 U.S.C. 1525. Requests for records, information, and data should be addressed as specified in 15 CFR Part 903.

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[1] Filed as part of the original document.

(b) Certified copies of NOAA records will be provided upon request. Requests for certified copies of these types of information should be referred to the following offices: Weather and Climatological Records; Director, National Climatic Data Center, National Environmental Satellite, Data, and Information Service, NOAA, Federal Building, Asheville, NC 28801. Weather Forecasts and Warnings; Aviation Services Branch (W/OM13), National Weather Service, NOAA, Silver Spring, MD 20910. Aeronautical Charts; Aeronautical Charting Division (N/CG3), National Ocean Service, NOAA, Rockville, MD 20852. Nautical Charts; Chart Information Section (N/GC222), National Ocean Service, NOAA, Rockville, MD 20852. Other; Office of the General Counsel, National Oceanic and Atmospheric Administration, Washington, DC 20230.

(c) Requests for the appearance of NOAA employees to give testimony in litigation not involving the United States should be addressed to the Office of General Counsel at the address shown in paragraph (b) of this section.

[43 FR 36240, Aug. 16, 1978, as amended at 48 FR 17064, Apr. 21, 1983]

§ 909.3 Response to subpena duces tecum.

(a) Any officer or employee served with a subpena duces tecum or the equivalent for the production of any NOAA record shall promptly notify the Office of General Counsel. The subpena duces tecum shall be treated as a request for records, information, or data under 15 CFR Part 903.

(b) The officer or employee served shall decline to produce the record that is the subject of a subpena duces tecum until its release has been authorized pursuant to 15 CFR Part 903. If, as a result of having complied with the preceding sentence of this subsection, the officer or employee is ordered to show cause why he or she should not be held in contempt of the court issuing the subpena, the General Counsel shall request the Department of Justice to represent the officer or employee.

§ 909.4 Testimony by NOAA employees in litigation not involving the United States.

(a) No NOAA officer or employee shall give testimony in any tribunal concerning any function of NOAA, or any data, information, or record created or acquired by NOAA as a result of the discharge of its official duties, without the prior authorization of the general counsel or the general counsel's designee.

(b) Upon receiving a subpena which orders the giving of testimony, a NOAA officer or employee shall immediately notify the Office of General Counsel. The officer or employee shall decline to testify unless otherwise authorized by the general counsel or designee. If, as a result of having complied with the provisions of this section, the officer or employee is ordered to show cause why he or she should not be held in contempt of the court issuing the subpena, the general counsel shall request the Department of Justice to represent the officer or employee.

§ 909.5 Conditions for authorizing testimony.

(a) Any non-Federal party desiring testimony from a NOAA officer or employee shall make a written request therefor addressed to the Office of General Counsel. The request shall include a general statement of the testimony to be elicited, the requester's interest in that testimony, a brief description of the intended use of the testimony and a statement as to why the testimony is not available elsewhere.

(b) The general counsel or designee shall authorize a NOAA officer or employee to provide factual testimony when the requesting party has sufficiently shown: (1) That the evidence to be adduced is not reasonably available from any other source; (2) that no NOAA record or data could be introduced in evidence in substitution for the testimony; and (3) that the other requirements of this part have been met.

(c) Where less than all of the conditions of paragraph (b) of this section are met, the general counsel or designee may authorize NOAA employees and officers to provide factual or expert testimony on any matters where NOAA has a significant interest in the litigation and the outcome may affect the implementation present or future policies, or where circumstances or conditions make it necessary to provide the information in the public interest.

(d) If the general counsel or designee authorizes the testimony of a NOAA officer or employee, then the Office of General Counsel may arrange for the taking of the testimony by methods that are less disruptive of the official activities of the officer or employee than providing testimony in court. Testimony may, for example, be provided by affidavits, answers to interrogatories, written depositions, or depositions transcribed, recorded, or preserved by any other method allowable by law. Costs of providing testimony, including transcripts, will be borne by the party requesting the testimony.

PART 911—THE UNITED STATES GEOSTATIONARY OPERATIONAL ENVIRONMENTAL SATELLITE (GOES) DATA COLLECTION SYSTEM (DCS)

Sec.

911.1 General information.
911.2 Use of the GOES DCS.
911.3 Treatment of data.
911.4 Continuation of GOES-DCS.
911.5 GOES-DCS Use Agreements.

AUTHORITY: 15 U.S.C. 313; 49 U.S.C. 1463; 15 U.S.C. 1525; 7 U.S.C. 450b; 5 U.S.C. 552.

SOURCE: 46 FR 48635, Oct. 2, 1981, unless otherwise noted.

§ 911.1 General information.

(a) The GOES Data Collection System (DCS) provides an effective method for obtaining environmental data from remote locations where conventional communications are either absent or inadequate. The use of the DCS is limited to the collection of environmental data in accordance with applicable International Telecommunication Union (ITU) regulations concerning use of the allocated frequency bands.

(b)(1) The DCS was established in 1974 to obtain from remote locations data required for the effective accomplishment of programs of the National Oceanic and Atmospheric Administration. The DCS capacity can more than provide for all of NOAA's present and near future domestic and international requirements. This makes it possible to offer to Federal and State agencies or local governments of the United States, and to those private users and foreign government agencies whose use of the system would support a program of a United States agency, the opportunity to make use of the DCS. Policy guidelines are set forth below.

(2) For purposes of this part, "user" refers to a private or governmental organization, whether for-profit or not for-profit, that owns or operates environmental data collection platforms for the purpose of collection and transmission of environmental data through the GOES DCS and for which a Federal agency or State or local government has a requirement for or interest in obtaining the data.

(3) For purposes of this part, "Assistant Administrator" means the Assistant Administrator for Environmental Satellite, Data, and Information Services or his/her designee.

[46 FR 48635, Oct. 2, 1981, as amended at 51 FR 3466, Jan. 28, 1986]

§ 911.2 Use of the GOES DCS.

(a) Use of the GOES DCS can be authorized only for the purpose of collecting environmental data. Environmental data as used here means observations and measurements of the physical, chemical or biological properties of the ocean, rivers, lakes, solid earth, and atmosphere (including space).

(b)(1) Except as provided in paragraph (b)(2) of this section, the GOES DCS is not to be used for data collection where adequate private common carrier communications exist to provide the service. (Adequate is defined in terms of capacity, speed and reliability with respect to the particular use envisioned.) A user must document, with a request for use of the

GOES DCS, why private common carrier communications are not adequate.

(2) NOAA may authorize the use of the GOES DCS for environmental data collection critical to a federal program where adequate common carrier communications exist when use of the common carrier would substantially increase the cost to the federal program of collecting these data.

(c) A user must identify the Federal agency or State or local government which will benefit from the proposed collection of data. NOAA will confirm with the identified sponsor that these data are required by it and that the sponsor is willing to share with the user any frequency channel resource allocated to it.

(d) User agencies and organizations will be admitted to system use with priority status as follows:

(1) NOAA users or users whose data are required for implementation of NOAA programs.

(2) Users whose data are desired to support NOAA programs.

(3) Users whose data and/or use of the GOES DCS will further a program of an agency or department of the United States Government.

(4) Users whose data are required by a State or local government of the United States. No other users will be admitted to system use.

(e) All users of the GOES DCS must use a data collection platform radio set whose technical characteristics conform to specifications established by NOAA. The message format must be as specified by NOAA.

(f) All users are responsible for all costs associated with the procurement and operation of the platforms, any confidential treatment of data under § 911.3, and for the acquisition of the data from those platforms either directly from the satellite or from the NOAA GOES Data Collection Center at the World Weather Building in Suitland, Maryland.

(g) Design characteristics of the environmental data collection system on the spacecraft require that users conform to technical standards established by NOAA. See § 911.5 of this part.

(h) NOAA will make every effort to maintain the GOES DCS in full operation at all times subject to the availability of appropriations. NOAA will bear no responsibility for any losses as a result of the nonavailability of the DCS.

(Approved by the Office of Management and Budget under control number 0648-0157)

[46 FR 48635, Oct. 2, 1981, as amended at 51 FR 3466, Jan. 28, 1986]

§ 911.3 Treatment of data.

(a) All users of the GOES DCS must agree to permit NOAA and other agencies of the United States Government the free and open use of all data collected from their platforms, except as otherwise provided for in paragraphs (b) through (f) of this section, and to provide NOAA with the necessary information on data formats to facilitate such use.

(b) NOAA will consider a request from a user, who has otherwise met the criteria of § 911.2, for proprietary treatment by NOAA of all or a portion of the data collected from the platforms owned by the user. Each request for proprietary treatment must:

(1) Specifically identify the exact portion(s) of the data claimed to be confidential;

(2) State whether the data claimed to be confidential is commonly known within the user's industry or activity or is readily ascertainable by outside persons with a minimum of time and effort;

(3) State how release of the data would be likely to cause substantial harm to the user's competitive position;

(4) Identify the Federal agency or governmental program which would benefit by gaining access to the data to be collected;

(5) State whether the submitter is authorized to make claims of confidentiality on behalf of the person or organization concerned; and

(6) State when the confidential data may be made public.

(c)(1) NOAA may treat environmental data obtained by the GOES DCS as proprietary if the Assistant Administrator with the advice of the General Counsel and other interested Federal officers, finds that:

(i) The data are trade secrets or commercial information obtained from a user and privileged or confidential; and

(ii) Use of the GOES DCS for collection and proprietary treatment of such data is in the public interest. Proprietary treatment of data which are required to protect life or property will be deemed not to be in the public interest.

(2) All data for which the Assistant Administrator grants proprietary treatment shall not be publicly disclosed in individually identifiable form without the user's authorization, except in accordance with the procedures set forth in paragraph (f) of this section or pursuant to the order of a court of competent jurisdiction. Such data may be combined and publicly disclosed in such formats as general statistical studies, environmental warnings and forecasts, or aggregated reports or summaries in which the identity of the user(s) furnishing such information or the confidential portions of the data shall not be disclosed.

(d)(1) The Assistant Administrator shall notify the user in writing whether all or a portion of the data will be treated as proprietary and shall state the reasons for the decision. The user may appeal the initial decision of the Assistant Administrator by filing a notice of appeal, including supporting information, with the Administrator of NOAA, Department of Commerce, Washington, DC 20230, within 30 days (excluding Saturdays, Sundays and legal holidays) of receipt of notice.

(2) The Administrator may decide the appeal on the basis of the information already submitted or may request additional information from the user. The decision of the Administrator shall state the reasons for the decision, and shall become effective upon issuance.

(e) The Assistant Administrator after consultation with other interested NOAA officers, shall institute a control system to protect the confidentiality of data that have been granted proprietary treatment under this section and are in the possession of NOAA. The control system will provide for safeguarding the data and ensuring that only authorized officers and employees have access to the data for official purposes.

(f) Data that have been accorded proprietary treatment for which NOAA or another Federal agency has no present requirement may be returned to the possession of the user and kept by the user until such time as NOAA or another Federal agency has a present requirement for the data at which time the data shall be made available to NOAA or to another Federal agency in accordance with the terms of a mutually acceptable agreement.

(g)(1) All requests from any person(s) for data granted proprietary treatment under this section shall be processed consistent with NOAA Freedom of Information Act (FOIA) Regulations (15 CFR Part 903), NOAA Directives Manual 21-25, Department of Commerce Administrative Orders 205-12 and 205-14 and 15 CFR Part 4.

(2) The user shall be notified within five days (excluding Saturdays, Sundays, and legal public holidays) of receipt by NOAA of an FOIA request for disclosure of data which otherwise have been granted proprietary treatment under this section. The user may submit written objections to release of the data, together with any supporting information, to the Assistant Administrator within five days (excluding Saturdays, Sundays and legal public holidays) of receipt of notice. The failure to object within the prescribed time limit will be considered an acknowledgment that the user does not wish to claim exempt status under the FOIA.

(3) If data which have been granted proprietary treatment under this section are found to be disclosable, in whole or in part, under the FOIA, the user submitting the data will be notified in writing and given five days (excluding Saturdays, Sundays, and legal holidays) from receipt of the notice to seek judicial relief.

(Approved by the Office of Management and Budget under control number 0648-0157)

[46 FR 48635, Oct. 2, 1981, as amended at 51 FR 3466, Jan. 28, 1986]

§ 911.4 Continuation of GOES-DCS.

(a) NOAA expects to continue to operate a geostationary satellite data collection system while it operates GOES satellites, subject to the availability of future appropriations.

(b) As use of the system in support of NOAA programs increases, it eventually may be necessary to restrict the use by other users. If a use restriction should become necessary, or in the event that NOAA discontinues operation of GOES, NOAA will provide, to the maximum extent possible, advance notice to the affected users.

§ 911.5 GOES-DCS Use Agreements.

(a) Each user must have an agreement with NOAA to use the GOES DCS.

(b) These agreements will cover, but will not be limited to: (1) The period of time the agreement is valid and procedures for cancelling it, (2) conformance with ITU agreements and regulations, (3) required equipment standards, (4) standards of operation, (5) priorities for use, (6) reporting time and frequencies, (7) data formats, (8) data delivery systems and schedules, (9) user-borne costs, and (10) proprietary treatment of data under § 911.3.

(c) The representative of NOAA for evaluating use requests and concluding use agreements will be the Director of Data Services for the National Earth Satellite Service, except that in the case of agreements which involve foreign government agencies or requsts for proprietary treatment of data, the concurrence of the Assistant Administrator will be obtained.

[46 FR 48635, Oct. 2, 1981, as amended at 51 FR 3466, Jan. 28, 1986]

PART 917—NATIONAL SEA GRANT PROGRAM FUNDING REGULATIONS

Subpart A—General

Sec.
917.1 Basic provisions.
917.2 Definitions.

Subpart B—Sea Grant Matched Funding Program

917.10 General.
Sec.
917.11 Guidelines for Sea Grant Fellowships.

Subpart C—National Projects

917.20 General.
917.21 National needs and problems.
917.22 National Projects funding.

Subpart D—International Cooperation Assistance

917.30 General.

Subpart E—General Considerations Pertaining to Sea Grant Funding

917.40 General.
917.41 Application guidance for Sea Grant funding.
917.42 Categories of support available for the conducting of Sea Grant activities.
917.43 Terms and conditions of Sea Grant funding.

AUTHORITY: Pub. L. 94-461, 90 Stat. 1961 (33 U.S.C. 1121 et seq.).

SOURCE: 43 FR 15307, Apr. 11, 1978, unless otherwise noted.

Subpart A—General

§ 917.1 Basic provisions.

(a) This section sets forth the basic purposes for which Sea Grant funding may be made pursuant to the following sections of the Act: 33 U.S.C. 1124, 1127, 1125 and 1124a. These sections provide for the funding of programs and projects in fields related to ocean and coastal resources that involve marine research, marine education and training, and marine advisory services. However, there is a significant difference in focus among these sections since section 1124(a) is concerned chiefly with regional and state needs relative to ocean and coastal resources (including the funding of Sea Grant Fellowships under section 1127) while section 1125 is concerned with national needs and problems relative to ocean and coastal resources, and section 1124a is concerned with programs of international cooperation assistance with respect to those resources.

(b) *Comment:* Statutory citation 33 U.S.C. 1124(a):

In General. The Secretary may make grants and enter into contracts under this subsection to assist any Sea Grant program or project if the Secretary finds that such program or project will—

(1) Implement the objective set forth in Section 202(b); and

(2) Be responsive to the needs or problems of individual states or regions.

The total amount paid pursuant to any such grant or contract may equal 66⅔ percent, or any lesser percent, of the total cost of the Sea Grant program or project involved.

(c) *Comment:* Statutory citation 33 U.S.C. 1127(a):

In General. The Secretary may enter into contracts and make grants under this section to—

(1) Enhance the research and development capability of developing foreign nations with respect to ocean and coastal resources.

(2) Promote the international exchange of information and data with respect to the assessment, development, utilization, and conservation of such resources.

§ 917.2 Definitions.

(a) The term "Act" means the Sea Grant Program Improvement Act of 1976, as amended (33 U.S.C. 1121 et seq.).

(b) The term "Secretary" means the Secretary of Commerce.

(c) The term "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration.

(d) The term "Office of Sea Grant" means the National Oceanic and Atmospheric Administration's Office of Sea Grant, which administers the National Sea Grant Program provided for in the Act.

(e) The term "objective of the Act" means the objective set forth at 33 U.S.C. 1121(b) and is "is to increase the understanding, assessment, development, utilization, and conservation of the Nation's ocean and coastal resources by providing assistance to promote a strong educational base, responsive research and training activities, and broad and prompt dissemination of knowledge and techniques."

(f) The term "ocean and coastal resource(s)" is as defined at 33 U.S.C. 1122(7) and means:

any resource (whether living, nonliving, manmade, tangible, intangible, actual, or potential) which is located in, derived from, or traceable to, the marine environment. Such term includes the habitat of any such living resource, the coastal space, the ecosystems, the nutrient rich areas, and the other components of the marine environment which contribute to or provide (or which are capable of contributing to or providing) recreational, scenic, esthetic, biological, habitational, commercial, economic, or conservation values. Living resources include natural and cultured plant life, fish, shellfish, marine mammals, and wildlife. Nonliving resources include energy sources, minerals, and chemical substances.

(g) The term "marine environment" used in the definition for "ocean and coastal resources" in § 917.2(e) and used elsewhere in these regulations is as defined at 33 U.S.C. 1122(6) and means:

the coastal zone, as defined in Section 304(1) of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453(1)); the seabed, subsoil, and waters of the territorial sea of the United States; the waters of any zone over which the United States asserts exclusive fishery management authority; the waters of the high seas; and the seabed and subsoil of and beyond the outer Continental Shelf.

(h) The term "person" is as defined at 33 U.S.C. 1122(9) and means: "any individual; any public or private corporation, partnership, or other association or entity (including any Sea Grant College, Sea Grant Regional Consortium, education, institute, or laboratory); or any state, political subdivision of a state, or agency or officer thereof."

(i) The term "Sea Grant College" is as defined at 33 U.S.C. 1122(10) and means: "any public or private institution of higher education which is designated as such by the Secretary . . ." pursuant to regulations promulgated at 15 CFR Part 918.

(j) The term "Sea Grant Program" is as defined at 33 U.S.C. 1122(11) and means: "any program which" (1) is administered by a Sea Grant College, Sea Grant Regional Consortium, institution of higher education, institute, laboratory, or state or local agency; and (2) includes two or more projects involving one or more of the following activities in fields related to ocean and coastal resources:

(i) Research,

(ii) Education,

(iii) Training, or

(iv) Advisory services.

(k) The term "Sea Grant Program Directors" means the local Directors of the Sea Grant coherent area programs, insititutional programs, Sea Grant Colleges, and Sea Grant Regional Consortia.

(l) The term "Sea Grant Regional Consortium" is as defined at 33 U.S.C. 1122(12) and means: "any association or alliance which is designated as such by the Secretary . . ." pursuant to regulations promulgated at 15 CFR Part 918.

(m) The term "state" is as defined at 33 U.S.C. 1122 (14) and means: "any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Mariana Islands, or any other territory or possession of the United States."

(n) The term "developing foreign nations" includes any foreign nation other than a foreign nation that is ineligible for designation under section 502(b) of the Trade Act of 1974, (19 U.S.C. 2462(b)) as a benificiary developing country under Title of that Act.

Subpart B—Sea Grant Matched Funding Program

§ 917.10 General.

(a) 33 U.S.C. 1124(a) establishes a program for the funding of Sea Grant Programs and projects dealing with marine research, marine education and training, and/or marine advisory services, that are designed to achieve the objective of the Act and that generally respond to the needs of individual states or regions. Included as a part of this program is the Sea Grant Fellowship Program, established by 33 U.S.C. 1127. Any person may apply to the Office of Sea Grant for Sea Grant Matched Funding Program Monies, except for Sea Grant Fellowship funding. Sea Grant Fellowship funding may be granted only to Sea Grant Colleges, Sea Grant Regional Consortia, institutions of higher education, and professional associations and institutions.

(b) Federal Sea Grant funding for the section 1124(a) Matched Funding Program cannot exceed 66⅔ percent of the total cost of the project involved.

§ 917.11 Guidelines for Sea Grant Fellowships.

(a) Sea Grant Fellowships are designed to provide educational and training assistance to qualified individuals at the undergraduate and graduate levels of education in fields related to ocean and coastal resources. The objective of the program is to increase the national supply of individuals educated and trained in the assessment, development, utilization, and conservation of ocean and coastal resources. The purpose of this section is to provide guidelines regarding the content of applications for Sea Grant Fellowship funding.

(b) Funding will be made to eligible entities (see § 917.10 of this part) that are selected to award and administer Sea Grant Fellowships. Fellowships will not be awarded directly to students by the Office of Sea Grant. The entity receiving Fellowship funding will select the students to be awarded the Fellowships and will handle the administration of the Fellowships.

(c) Proposals for Fellowship funding will be expected to address (1) the nature and focus of the proposed Fellowship Program, (2) the utilization of institutional or other appropriate resources in the education and training of Sea Grant Fellows, (3) the method of advertising availability of the Fellowships, (4) the method of selection of recipients, and (5) the terms of tenure and method of determining continuity of tenure.

(d) Innovation and uniqueness will be significant factors in the determination of which proposals will be funded. Another factor considered will be the potential of the proposed program to stimulate interest in marine related careers among those individuals; for example, minorities, women, and the handicapped whose previous background or training might not have generated such an interest.

(e) The total amount that may be provided for grants under the Sea Grant Fellowship Program during any fiscal year cannot exceed an amount equal to five percent of the total funds

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appropriated for the Matched Funding Program for that year. Fellowship programs are subject to the requirement of a minimum of 33⅓ percent matching funds from non-Federal sources to which all Matched Funding Program projects are subject. Indirect costs are not allowable for either the Fellowships or for any costs associated with the Fellowships.

Considering the variations in the cost-of-living and the differences in tuition, fees, etc., between one college or university and another, the amount of money requested and awarded per Fellowship may vary.

Subpart C—National Projects

§ 917.20 General.

(a) 33 U.S.C. 1125 requires the Secretary to identify specific national needs and problems relative to ocean and coastal resources. This responsibility has been delegated to the Administrator. The designation is intended to focus public attention on needs and problems of the marine environment that are considered to be of particular national importance at a given point in time.

(b) 33 U.S.C. 1125 provides for the funding of national projects in marine research, marine education and training, and marine advisory services that are designed to deal with the national needs and problems concerning ocean and coastal resources identified by the Administrator.

(c) The Administrator will identify the national needs and problems apart from considerations of Office of Sea Grant funding for "National Projects" responsive to national needs and problems that are identified.

§ 917.21 National needs and problems.

(a) The Administrator will, periodically, publish in the FEDERAL REGISTER the identified national needs and problems with respect to ocean and coastal resources at a given point in time.

(b) Suggestions from the general public as to the identity of national needs and problems may be submitted to the Office of Sea Grant at any time. These suggestions will be reviewed by the Office of Sea Grant and the Sea Grant Review Panel, and those receiving a positive critique will be forwarded to the Administrator. In addition, suggestions concerning the identification of national needs and problems will be requested from the Sea Grant Program Directors.

(c) The Administrator has identified the following as currently being national needs and problems with respect to ocean and coastal resources:global and regional climate and primary productivity.

(1) Improve the prediction of extreme natural events and their effects on ocean coastal and continental shelf locations as well as analogous regions of the Great Lakes.

(2) Improve the predictability of global sea-level change and determine the impact of this change on coastal areas.

(3) Define the processes that determine ocean variability on the time scale of a few weeks to a few years, and the relationship to fluctuations in global and regional climate, primary productivity, and fisheries production.

(4) Improve understanding of the flow fields and mixing processes on the continental shelves of the United States.

(5) Develop an increased understanding of the arctic and antarctic environment and a capability to predict the special hazards posed to transportation and resource development.

(6) Develop and increased capability to characterize the engineering properties of ocean botton sediments.

(7) Reduce the recurring economic loss due to corrosion of structures, vessels, and other devices in the marine environment.

(8) Gain a fundamental understanding of the processes by which biological fouling and associated corrosion are initiated upon material surfaces exposed to seawater.

(9) Investigate methods to improve man's underwater capability to conduct undersea research and perform useful work.

(10) Investigate the wider application of remotely operated and artificial intelligence techniques for vehicles for undersea activities.

(11) Expand/improve remote sensing technologies for use on the ocean and Great Lakes.

(12) Advance knowledge of acoustics in the ocean and ocean bottom in order to exploit the burgeoning acoustics technologies.

(13) Develop techniques for in-situ monitoring of biological, chemical, and physical processes in the Great Lakes, oceans, and their connecting waterways which are cost effective and provide data in real time.

(14) Improve the position of the U.S. seafood industry in world seafood markets.

(15) Design more efficient mechanisms to allocate U.S. fish resources to achieve optimum yield and minimize industry dislocations.

(16) Gain a fundamental understanding of the biological productivity of estuarine and coastal waters.

(17) Conduct research leading to the restoration and/or enhancement of heavily exploited fishery stocks.

(18) Improve the capability for stock assessment, predicting yield, age-class strength, and long-term population status of important fisheries.

(19) Conduct research to increase the economic potential of low-value, high-volume fish products.

(20) Develop productive and profitable aquaculture industries in the United States and technology that can be exported to less developed nations of the world with different climate, cultural, and economic constraints.

(21) Explore marine biochemicals as source of chemical feedstocks, enzymes, pharmacological substance, and other bioactive agents such as pesticides.

(22) Apply modern biotechnology to exploiting marine plants, animals, and microorganisms for good and services.

(23) Develop rapid, efficient, and specific methods for assaying the potential of marine organisms to communicate disease to humans.

(24) Develop innovations that would promote safe, nondestructive, recreational access to and use of marine and Great Lakes water.

(25) Re-examine the ocean as an appropriate place for the disposal of wastes from land-based society.

(26) Develop an increased understanding of the impacts of low density, nonbiodegradable, solid wastes on marine and Great Lakes species.

(27) Conduct research for realizing the economic potential of the nonliving resources of the U.S. 200-mile Exclusive Economic Zone.

(28) Investigate the effect of seafloor hydrothermal systems on the seafloor, oceans, and atmosphere.

(29) Develop a better understanding of the value the marine sector contributes to the U.S. economy and culture.

(30) Improve the competitive position of American ports in the face of rapid technological and social change.

(31) Improve the capability of developing nations to address their marine resource needs.

(32) Develop eductional programs to increase application of marine sector research.

(33) Develop syntheses of and better access to existing multidisciplinary marine and Great Lakes information.

[43 FR 15307, Apr. 11, 1978, as amended at 51 FR 35210, Oct. 2, 1986]

§ 917.22 National Projects funding.

(a) National Projects funding proposals will be expected to address: (1) The relevance of the proposed project to a national need or problem that has been identified by the Administrator; (2) the nature and focus of the proposed project; (3) a demonstrated capacity to carry out the proposed project in a competent and cost-effective manner; and (4) the utilization of existing capability and coordination with other relevant projects. Innovation and uniqueness will be significant factors in determining whether to fund a proposed project.

(b) Any person may apply to the Office of Sea Grant for National Project funding. In addition, the Office of Sea Grant may invite applications for National Project funding.

(c) The total amount provided for National Projects' funding during any fiscal year can never exceed an amount equal to 10 percent of the total funds appropriated for the Matched Funding Program. Federal Sea Grant funding for National Projects can be up to 100 percent of the total cost of the project involved.

Subpart D—International Cooperation Assistance

§ 917.30 General.

(a) 33 U.S.C. 1124a sets up a program of International Cooperation Assistance in marine reseach, marine education and training, and marine advisory services designed to enhance the research and technical capability of developing foreign nations with respect to ocean and coastal resources and to promote the international exchange of information and data with respect to the assessment, development, utilization, and conservation of such resources. Any Sea Grant College or Sea Grant Regional Consortium or any institution of higher education, laboratory, or institute (if such institution, laboratory or institute is located within any state) may apply for and receive International Cooperation Assistance funding.

(b) International Cooperation Assistance funding proposals will be expected to address: (1) The nature and focus of the proposed project, (2) the utilization of institutional and other appropriate resources in the implementation of the project, (3) a clear indication of the foreign participant's (individual or institution) commitment to the project, (4) identification of accomplishments expected from a single granting interval, (5) implicit or explicit out-year commitment of resources, and (6) the impact of the proposed project on the institution receiving funding.

(c) The projects supported by International Cooperation Assistance funding are intended to be genuinely cooperative. Innovation and uniqueness will be significant factors in the determination of proposals to be funded. In the case of a proposed international project that is submitted from an institution where a Sea Grant program is in existence, the extent to which the proposed project takes advantage of the Sea Grant institutional capability existing at that institution and thereby strengthening it, as opposed to being a mere appendage to the ongoing Sea Grant program, will also be an important evaluation factor. The U.S. Department of State will be given the opportunity to review all International Cooperation Assistance projects and none will be funded without this consultation. Because the United Nations Educational, Scientific, and Cultural Organization (UNESCO) also funds international projects of the kind that can be funded under the Sea Grant International Cooperation Assistance program, and, to effect coordination in this area between Sea Grant and UNESCO, the Division of Marine Sciences (UNESCO) will be informed of all International Cooperation Assistance projects funded.

Subpart E—General Considerations Pertaining to Sea Grant Funding

§ 917.40 General.

This subpart sets forth general considerations pertaining to Sea Grant funding.

§ 917.41 Application guidance for Sea Grant funding.

(a) Detailed guidance for submission of applications for National Sea Grant Program Funding is given in the publication, "The National Sea Grant Program: Program Description and Suggestions for Preparing Proposals," available on request from: Office of Sea Grant Program, 3300 Whitehaven Street NW., Washington, DC 20235.

(b) It is noted here that application for Sea Grant funding shall be made pursuant to the following Federal provisions:

(1) OMB Circular A-110 "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations."

(2) OMB Circular A-111, "Designation of Federal Programs Suitable for Joint Funding Purposes."

(3) GSA FMC 73-6, "Coordinating Indirect Cost Rates and Audit at Educational Institutions."

(4) GSA FMC 73-7, "Administration of College and University Research Grants."

(5) GSA FMC 73-8, "Cost Principles for Educational Institutions."

(6) GSA FMC 74-4, "Cost Principles Applicable to Grants and Contracts with State and Local Governments."

(7) OMB Circular A-102, "Uniform Administrative Requirements for

Grants-in-Aid to State and Local Governments."

(8) NOAA General Provisions implementing OMB Circular A-110, "Grants and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations."

§ 917.42 Categories of support available for the conducting of Sea Grant activities.

(a) Three categories of support are available for the conducting of Sea Grant activities: Projects; coherent area programs; and institutional programs. In general, funding for institutional programs and coherent area programs are made with expectation of renewal, as long as the funding recipient maintains a high level of quality and relevance in its activities. Project funding is made generally for a single item of research, education and training, or advisory service, but may be renewed under certain conditions; each renewal is negotiated individually.

(b) Project support is for a clearly defined activity to be conducted over a definite period of time to achieve a specified goal. The project may be in research, education, training, or advisory services. Support for a project is made to an individual investigator or project director through his organization.

(c) Intermediate between the institutional programs and individual projects are coherent area programs. These have two main purposes:

(1) To bring into the National Sea Grant Program institutions of higher education that have a strong core of capability in some aspects of marine affairs, but which do not qualify or do not wish to qualify for institutional program support at this time. The purpose of support in such cases is to enable the institution to apply its existing competence to its regional problems and opportunities while developing the broader base of capability and the internal organization that will lead to institutional support. This program category requires a definite commitment on the part of the institution to develop an institutional program and to present a multiproject, multidisciplinary program involving the existing competence of an institution in a unified or coherent attack on well-defined local or regional problems. Such a coherent area program should include research, education and training, and advisory services, to the extent of the institution's capability.

(2) To bring into the National Sea Grant Program (on a more or less continuing basis) qualified entities that have rare or unique capability in a specialized field of marine affairs. Such entities need not be institutions of higher education.

(d) Institutional grants are made to institutions of higher education or to a combination of institutions that have an existing broad base of competence in marine affairs. To qualify, an institution must make a positive, long-range commitment to objectives of the National Sea Grant Program as evidence by committing the institution's own resources in the form of matching funds, creation of the organization necessary for management of the Sea Grant Program, quality education programs in marine areas, establishment of interdisciplinary research teams, and development of advisory service mechanisms for strong interaction with marine communities in its region. A Sea Grant institutional program is expected to provide intellectual leadership in assisting its region to solve problems and to realize opportunities of its marine environment. To the extent possible, an institutional program should involve all appropriate elements of the institution, whether colleges or departments, and devise cooperative or mutally supporting programs with other institutions of higher education, and with Federal and state agencies, local agencies, and industry. An institutional program should have substantial strength in the three basic Sea Grant activities: research, education and training, and advisory services. Sea Grant institutional programs that meet the qualifications for Sea Grant College or Sea Grant Regional Consortium status set forth at 15 CFR Part 918 will be so designated by the Secretary.

§ 917.43 Terms and conditions of Sea Grant funding.

No Sea Grant funding may be applied to:

(a)(1) the purchase or rental of any land or (2) the purchase, rental, construction, preservation, or repair of any building, dock, or vessel, except that payment under any such grant or contract may (if approved by the Assistant Administrator for Administration of the National Oceanic and Atmospheric Administration or designee) be applied to the purchase, rental, construction, preservation, or repair of non-self-propelled habitats, buoys, platforms, and other similar devices or structures, or to the rental of any research vessel which is used in direct support of activities under any Sea Grant program or project.

(b) In addition, Sea Grant funding under the Sea Grant Matched Funding Program will be subject to the limitation that the total amount which may be obligated within any one state to persons under the Sea Grant Matched Funding Program in any fiscal year shall not exceed an amount equal to 15 percent of the funds appropriated for the Sea Grant Matched Funding Program.

(c) Any person who receives or utilizes Sea Grant funding shall keep the records required by OMB Circular A-110, "Grant and Agreements with Institutions of Higher Education, Hospitals, and Other Non-Profit Organizations," and by NOAA General Provision, implementing OMB Circular A-110, by OMB Circular A-102, "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments," including records that fully disclose the amount and disposition by the recipient of such proceeds, the total cost of the program or project in which such proceeds were used, and the amount, if any, of such cost which was provided through other sources. Such records shall be maintained for three years after the completion of such a program or project. The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and evaulation, to any books, documents, papers, and records of receipt which, in the opinion of the Secretary or the Comptroller General, may be related or pertinent to such grants and contracts.

PART 918—SEA GRANTS

Sec.
918.1 Introduction.
918.2 Definitions.
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918.4 Duration of Sea Grant College designation.
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918.7 Application for designation.

AUTHORITY: Sec. 207, National Sea Grant College Program Act, as amended (Pub. L. 94-461, 33 U.S.C. 1121, et seq.).

SOURCE: 44 FR 75054, Dec. 18, 1979, unless otherwise noted.

§ 918.1 Introduction.

Pursuant to section 207 of the National Sea Grant College Program Act, as amended (Pub. L. 94-461, 33 U.S.C. 1121 et seq.), herein referred to as the Act, the following guidelines establish the procedures by which organizations can qualify for designation as Sea Grant Colleges or Sea Grant Regional Consortia, and the responsibilities required of organizations so designated.

§ 918.2 Definitions.

(a) *Marine environment.* The term "Marine Environment" means any or all of the following: the coastal zone, as defined in section 304(1) of the Coastal Zone Management Act of 1972 (16 U.S.C. 1453(1)); the seabed, subsoil and waters of the territorial sea of the United States, including the Great Lakes; the waters of any zone over which the United States asserts exclusive fishery management authority; the waters of the high seas; and the seabed and subsoil of and beyond the Outer Continental Shelf.

(b) *Ocean, Great Lakes, and coastal resources.* The term "ocean, Great Lakes, and coastal resources" means any resource (whether living, nonliving, manmade, tangible, intangible, actual, or potential) which is located in, derived from, or traceable to, the marine environment. Such term includes the habitat of any such living resource, the coastal space, the ecosystems, the nutrient-rich areas, and the other components of the marine environment which contribute to or provide (or which are capable of contributing to or providing) recreational, scenic, aesthetic, biological, habitational, commercial, economic, or conservation values. Living resources include natural and cultured plant life, fish, shellfish, marine mammals, and wildlife. Nonliving resources include energy sources, minerals, and chemical substances.

(c) *Person.* The term "Person" means any public or private corporation, partnership, or other association or entity (including any Sea Grant College, Sea Grant Regional Consortium, institution of higher education, institute, or laboratory); or any State, political subdivision of a State, or agency or officer thereof.

(d) *Sea Grant College.* The term "Sea Grant College" means any public or private institution of higher education or confederation of such institutions which is designated as such by the Secretary under section 207 of the National Sea Grant Program Act. Included in this term are all campuses (or other administrative entities) of a designated Sea Grant College, working through the established management structure of the Sea Grant College.

(e) *Sea Grant Program.* The term "Sea Grant Program" means any program which:

(1) Is administered by a Sea Grant College, Sea Grant Regional Consortium, institution of higher education, institute, laboratory, or State or local agency; and

(2) Includes two or more Sea Grant projects involving one or more of the following activities in fields related to ocean, Great Lakes, and coastal resources:

(i) Research,

(ii) Education and training, and

(iii) Advisory services.

(f) *Sea Grant project.* A Sea Grant project is any separately described activity which has been proposed to the National Sea Grant College Program, and has subsequently been approved.

(g) *Sea Grant Regional Consortium.* The term "Sea Grant Regional Consortium" means any association or other alliance of two or more persons as defined above (other than individuals) established for the purpose of pursuing programs in marine research education, training, and advisory services on a regional basis (i.e., beyond the boundaries of a single state) and which is designated as a consortium by the Secretary under section 207 of the National Sea Grant Program Act.

(h) *Field related to Ocean, Great Lakes, and coastal resources.* The term "field related to Ocean, Great Lakes, and coastal resources" means any discipline or field (including marine sciences and the physical, natural, and biological sciences, and engineering, included therein, marine technology, education, economics, sociology, communications, planning law, international affairs, public administration, humanities, and the arts) which is concerned with, or likely to improve the understanding, assessment, development, utilization, or conservation of, ocean, Great Lakes, and coastal resources.

§ 918.3 Eligibility, qualifications, and responsibility of a Sea Grant College.

(a) To be eligible for designation as a Sea Grant College, the institution of higher education or confederation of such institutions must have demonstrated a capability to maintain a high quality and balanced program of research, education, training, and advisory services in fields related to ocean, Great Lakes, and coastal resources for a minimum of three years, and have received financial assistance as an Institutional program under either section 205 of the National Sea Grant College Program Act or under section 204(c) of the earlier National Sea Grant College and Program Act of 1966.

(b) To be eligible for designation as a Sea Grant College, the candidate institution or confederation of institutions must meet the qualifications set forth above as evaluated by a site review team composed of members of the Sea

Grant Review Panel, NOAA's Office of Sea Grant, and other experts named by NOAA. As a result of this review, the candidate must be rated highly in all of the following qualifying areas:

(1) *Leadership.* The Sea Grant College candidate must have achieved recognition as an intellectual and practical leader in marine science, engineering, education, and advisory service in its state and region.

(2) *Organization.* The Sea Grant College candidate must have created the management organization to carry on a viable and productive Sea Grant Program, and must have the backing of its administration at a sufficiently high level to fulfill its multidisciplinary and multifaceted mandate.

(3) *Relevance.* The Sea Grant College candidate's program must be relevant to local, State, regional, or National opportunities and problems in the marine environment. Important factors in evaluating relevance are the need for marine resource emphasis and the extent to which capabilities have been developed to be responsive to that need.

(4) *Programmed team approach.* The Sea Grant College candidate must have a programmed team approach to the solution of marine problems which includes relevant, high quality, multidisciplinary research with associated educational and advisory services capable of producing identifiable results.

(5) *Education and training.* Education and training must be clearly relevant to National, regional, State and local needs in fields related to ocean, Great Lakes, and coastal resources. As appropriate, education may include pre-college, college, post-graduate, public and adult levels.

(6) *Advisory services.* The Sea Grant College candidate must have a strong program through which information, techniques,and research results from any reliable source, domestic or international, may be communicated to and utilized by user communities. In addition to the educational and information dissemination role, the advisory service program must aid in the identification and communication of user communities' research and educational needs.

(7) *Relationships.* The Sea Grant College candidate must have close ties with Federal agencies. State agencies and administrations, local authorities, business and industry, and other educational institutions. These ties are: (i) To ensure the relevance of its programs, (ii) to give assistance to the broadest possible audience, (iii) to involve a broad pool of talent in providing this assistance (including universities and other administrative entities outside the Sea Grant College), and (iv) to assist others in developing research and management competence. The extent and quality of an institution's relationships are critical factors in evaluating the institutional program.

(8) *Productivity.* The Sea Grant College candidate must have demonstrated the degree of productivity (of research results, reports, employed students, service to State agencies and industry, etc.) commensurate with the length of its Sea Grant operations and the level of funding under which it has worked.

(9) *Support.* The Sea Grant College candidate must have the ability to obtain matching funds from non-Federal sources, such as state legislatures, university management, state agencies, business, and industry. A diversity of matching fund sources is encouraged as a sign of program vitality and the ability to meet the Sea Grant requirement that funds for the general programs be matched with at least one non-Federal dollar for every two Federal dollars.

(c) Finally, it must be found that the Sea Grant College candidate will act in accordance with the following standards relating to its continuing responsibilities if it should be designated a Sea Grant College:

(1) Continue pursuit of excellence and high performance in marine research, education, training, and advisory services.

(2) Provide leadership in marine activities including coordinated planning and cooperative work with local, state, regional, and Federal agencies, other Sea Grant Programs, and non-Sea Grant universities.

(3) Maintain an effective management framework and application of in-

stitutional resources to the achievement of Sea Grant objectives.

(4) Develop and implement long-term plans for research, education, training, and advisory services consistent with Sea Grant goals and objectives.

(5) Advocate and further the Sea Grant concept and the full development of its potential within the institution and the state.

(6) Provide adequate and stable matching financial support for the program from non-Federal sources.

(7) Establish and operate an effective system to control the quality of its Sea Grant programs.

§ 918.4 Duration of Sea Grant College designation.

Designation will be made on the basis of merit and the determination by the Secretary of Commerce that such a designation is consistent with the goals of the Act. Continuation of the Sea Grant College designation is contingent upon the institution's ability to maintain a high quality performance consistent with the requirements outlined above. The Secretary may, for cause and after an opportunity for hearing, suspend or terminate a designation as a Sea Grant College.

§ 918.5 Eligibility, qualifications, and responsibilities—Sea Grant Regional Consortia.

(a) To be eligible for designation as a Sea Grant Regional Consortium, the candidate association or alliance of organizations must provide, in significant breadth and quality, one or more services in the areas of research, education, and training, or advisory service in fields related to ocean, Great Lakes, and coastal resources. Further, it is essential that the candidate Sea Grant Consortium be required to provide all three services as soon as possible after designation. Further, such association or alliance must demonstrate that:

(1) It has been established for the purpose of sharing expertise, research, educational facilities, or training facilities, and other capabilities in order to facilitate research, education, training, and advisory services in any field related to ocean, Great Lakes, and coastal resources; and

(2) It will encourage and follow a regional multi-State approach to solving problems or meeting needs relating to ocean, Great Lakes, and coastal resources, in cooperation with appropriate Sea Grant Colleges, Sea Grant Programs and other persons in the region.

(b) Although it is recognized that the distribution of effort between research, education, training, and advisory services to achieve appropriate balance in a Sea Grant Regional Consortium may differ from a Sea Grant College, sustained effort in all of these areas is, nonetheless, an essential requirement for retention of such designation. To be eligible for designation as a Sea Grant Regional Consortium, the candidate association or alliance of organizations must meet the qualifications set forth above as evaluated by a site review team composed of members of the Sea Grant Review Panel, the Office of Sea Grant, and other experts. Further, the candidate must be rated highly in all of the following qualifying areas which are pertinent to the Consortium's program:

(1) *Leadership.* The Sea Grant Regional Consortium candidate must have achieved recognition as an intellectual and practical leader in marine science, engineering, education, and advisory service in its region.

(2) *Organization.* The Sea Grant Regional Consortium candidate must have created the management organization to carry on a viable and productive multidisciplinary Sea Grant Program and have the backing of the administrations of its component organizations at a sufficiently high level to fulfill its multidisciplinary and multifaceted mandate.

(3) *Relevance.* The Sea Grant Regional Consortium candidate's Sea Grant Program must be relevant to regional opportunities and problems in the marine environment. Important factors in evaluating relevance are the extent and depth of the need of a region for a focused marine resource emphasis and the degree to which the candidate has developed its capability to be responsive to that need.

(4) *Education and training.* Education and training must be clearly relevant to regional needs and must be of high quality in fields related to ocean, Great Lakes, and coastal resources. As appropriate, education may include precollege, college, post-graduate, public and adult levels.

(5) *Advisory services.* The Sea Grant Regional Consortium candidate must have a strong program through which information techniques, and research results from any reliable source, domestic or international, may be communicated to and utilized by user communities. In addition to the educational and information dissemination role, the advisory service program must aid in the identification and communication of user communities' research and educational needs.

(6) *Relationships.* The Sea Grant Regional Consortium candidate must have close ties with federal agencies, state agencies and administrations, regional authorities, regional business and industry, and other regional educational institutions. These regional ties are: (i) To ensure the relevance of programs, (ii) to generate requests for such assistance as the consortium may offer, and (iii) to assist others in developing research and management competence. The extent and quality of a candidate's relationships are critical factors in evaluating the proposed designation.

(7) *Productivity.* The Sea Grant Regional Consortium candidate must have demonstrated a degree of productivity (of research results, reports, employed students, service to regional agencies, industry, etc.) commensurate with the length of its Sea Grant operations and the level of funding under which it has worked.

(8) *Support.* The Sea Grant Regional Consortium candidate must have the ability to obtain matching funds from non-Federal sources, such as State legislatures, university management, State agencies, and business and industry. A diversity of matching funds sources is encouraged as a sign of program vitality and the ability to meet the Sea Grant requirement that funds for the general programs be matched with at least one non-Federal dollar for every two Federal dollars.

(c) Finally, it must be found that the Sea Grant Regional Consortium candidate will act in accordance with the following standards relating to its continuing responsibilities as a Sea Grant Regional Consortium:

(1) Continue pursuit of excellence and high performance in marine research education, training, and advisory services.

(2) Provide regional leadership in marine activities including coordinated planning and cooperative work with local, State, regional, and Federal agencies, other Sea Grant Programs, and non-Sea Grant organizations.

(3) Maintain an effective management framework and application of organizational resources to the achievement of Sea Grant objectives.

(4) Develop and implement long-term plans for research, education, training, and advisory services consistent with Sea Grant goals and objectives.

(5) Advocate and further the Sea Grant concept and the full development of its potential within the consortium and the region.

(6) Provide adequate and stable matching financial support for the program from non-Federal sources.

(7) Establish and operate an effective system to control the quality of its Sea Grant program.

§ 918.6 Duration of Sea Grant Regional Consortium designation.

Designation will be made on the basis of merit and the determination by the Secretary of Commerce that such a designation is consistent with the goals of the Act. Continuation of the Sea Grant Regional Consortium designation is contingent upon the alliance's ability to maintain a high quality performance consistent with the standards outlined above. The Secretary may, for cause and after an opportunity for hearing, suspend or terminate the designation as a Sea Grant Regional Consortium.

§ 918.7 Application for designation.

(a) All applications for initial designation as a Sea Grant College or a Regional Consortium should be addressed to the Secretary of Commerce and submitted to the Director, National Sea Grant College Program, National Oceanic and Atmospheric Administration. The application should contain an outline of the capabilities of the applicant and the reasons why the applicant believes that it merits designation under the guidelines contained in this regulation. Upon receipt of the application, the Director will present the institution's case to the Sea Grant Review Panel for evaluation. The Panel's recommendation will be forwarded to the Secretary for final action.

(b) An existing Sea Grant College or Regional Consortium may also apply as in paragraph (a) of this section, for a change in the scope of designation to include or exclude other administrative entities of the institution or association. If approved by the Secretary such included (excluded) administrative entities shall share (lose) the full rights and responsibilities of a Sea Grant College or Regional Consortium.

PART 921—NATIONAL ESTUARINE RESERVE RESEARCH SYSTEM REGULATIONS

Sec.

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APPENDIX I TO PART 921—BIOGEOGRAPHIC CLASSIFICATION SCHEME
APPENDIX II TO PART 921—TYPOLOGY OF NATIONAL ESTUARINE RESEARCH RESERVES

AUTHORITY: Sec. 315, Public Law 92-583, as amended; 86 Stat. 1280 (16 U.S.C. 1461).

SOURCE: 55 FR 29949, July 23, 1990, unless otherwise noted.

Subpart A—General

§ 921.1 Mission, goals and general provisions.

(a) The mission of the National Estuarine Reserve Research System is the establishment and management, through Federal-State cooperation, of a national system of estuarine research reserves representative of the various regions and estuarine types in the United States. Estuarine research reserves are established to provide opportunities for long-term research, education, and interpretation.

(b) The goals of the program for carrying out this mission are to:

(1) Ensure a stable environment for research through long-term protection of estuarine reserve resources;

(2) Address coastal management issues identified as significant through coordinated estuarine research within the System;

(3) Enhance public awareness and understanding of the estuarine environment and provide suitable opportunities for public education and interpretation;

(4) Promote Federal, state, public and private use of one or more reserves within the System when such entities conduct estuarine research; and

(5) Conduct and coordinate estuarine research within the System, gathering and making available information necessary for improved understanding and management of estuarine areas.

(c) National estuarine research reserves shall be open to the public to the extent permitted under State and Federal law. Multiple uses are allowed to the degree compatible with the research reserve's overall purpose as provided in the management plan (see § 921.13) and consistent with paragraphs (a) and (b) of this section. Use levels are set by the individual state and analyzed in the management plan. The research reserve management plan shall describe the uses and establish priorities among these uses. The plan shall identify uses requiring a state permit, as well as areas where uses are encouraged or prohibited. Consistent with resource protection and research objectives, public access may be restricted to certain areas within a research reserve.

(d) Habitat manipulation for research purposes is allowed consistent with the following limitations. Manipulative research activities must be specified in the management plan, be consistent with the mission and goals of the program (see paragraphs (a) and (b) of this section) and the goals and objectives of the affected research reserve, and be limited in nature and extent to the minimum manipulative activity necessary to accomplish the stated research objective. Manipulative research activities with a significant or long-term impact on reserve resources require the prior approval of the state and the National Oceanic and Atmospheric Administration (NOAA). Manipulative research activities which can reasonably be expected to have a significant adverse impact on the estuarine resources and habitat of a reserve, such that the activities themselves or their resulting short- and long-term consequences compromise the representative character and integrity of a reserve, are not allowed. Habitat manipulation for resource management purposes is not permitted within national estuarine research reserves, except as allowed for restoration activities consistent with paragraph (e) of this section. NOAA may allow an exception to this prohibition if manipulative activity is necessary for the protection of public health or the preservation of other sensitive resources which have been listed or are eligible for protection under relevant Federal or state authority (*e.g.*, threatened/endangered species or significant historical or cultural resources). If habitat manipulation is determined to be necessary for the protection of public health or the preservation of sensitive resources, then these activities shall be specified in the Reserve Management Plan and limited to the reasonable alternative which has the least adverse and shortest term impact on the representative and ecological integrity of the reserve.

(e) Under the Act an area may be designated as an estuarine reserve only if the area is a representative estuarine ecosystem that is suitable for long-term research. Many estuarine areas have undergone some ecological change as a result of human activities (*e.g.*, hydrological changes, intentional/unintentional species composition changes—introduced and exotic species). In those areas proposed or designated as national estuarine research reserves, such changes may have diminished the representative character and integrity of the site. Although restoration of degraded areas is not a primary purpose of the System, such activities may be permitted to improve the representative character and integrity of a reserve. Restoration activities must be carefully planned and approved by NOAA through the Reserve Management Plan. Historical research may be necessary to determine the "natural" representative state of an estuarine area (*i.e.,* an estuarine ecosystem minimally affected by human activity or influence). Frequently, restoration of a degraded estuarine area will provide an excellent opportunity for management oriented research.

(f) NOAA may provide financial assistance to coastal states, not to exceed 50 percent of all actual costs or $4 million whichever amount is less, to assist in the acquisition of land and waters, or interests therein. NOAA may provide financial assistance to coastal states not to exceed 50 percent of all actual costs for the management and operation of, and the conduct of educational or interpretive activities concerning, national estuarine research reserves (see subpart I of this part). NOAA may provide financial assistance to any coastal state or public or private person, not to exceed 50 percent of all actual costs, to support research and monitoring within a national estuarine research reserve. Five types of awards are available under the National Estuarine Reserve Research System Program. The predesignation awards are for site selection, draft management plan preparation and conduct of basic characterization studies. Acquisition and development awards are intended primarily for acquisition of interests in land and construction. The operation and management award provides funds to assist in implementing the research, educational, and administrative programs detailed in the research reserve management plan and is reflective of the joint State-Federal partnership in the preservation and protection of estuarine resources. The research and monitoring awards provide funds to conduct estuarine research and monitoring within the System. The educational and interpretive award provides funds to conduct estuarine educational and interpretive activities within the System.

(g) Lands already in protected status managed by other Federal agencies, state or local governments, or private organizations can be included within national estuarine research reserves only if the managing entity commits to long-term non-manipulative management consistent with paragraphs (d) and (e) of this section in the reserve management plan. Federal lands already in protected status cannot comprise the key land and water areas of a research reserve (see § 921.11(c)(3)).

(h) To assist the states in carrying out the Program's goals in an effective manner, the National Oceanic and Atmospheric Administration (NOAA) will coordinate a research and education information exchange throughout the national estuarine research reserve system. As part of this role, NOAA will ensure that information and ideas from one reserve are made available to others in the system. The network will enable reserves to exchange information and research data with each other, with universities engaged in estuarine research, and with Federal and state agencies. NOAA's objective is a system-wide program of research and monitoring capable of addressing the management issues that affect long-term productivity of our Nation's estuaries.

§ 921.2 Definitions.

(a) *Act* means the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.* Section 315 of the Act, 16 U.S.C. 1461, establishes the National Estuarine Reserve Research System.

(b) *Under Secretary* means the Under Secretary for Oceans and Atmosphere, U.S. Department of Commerce, or designee.

(c) *Coastal state* means a state of the United States, in or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. For the purposes of these regulations the term also includes Puerto Rico, the Virgin Islands, Guam, the Commonwealth of the Northern Marianas Islands, the Trust Territories of the Pacific Islands, and American Samoa (see 16 U.S.C. 1453(4)).

(d) *Estuary* means that part of a river or stream or other body of water having unimpaired connection with the open sea, where the sea water is measurably diluted with fresh water derived from land drainage. The term also includes estuary-type areas with measurable freshwater influence and having unimpaired connections with the open sea, and estuary-type areas of the Great Lakes and their connecting waters. See 16 U.S.C. 1453(7)).

(e) *National Estuarine Research Reserve* means an area that is a representative estuarine ecosystem suitable for long-term research, which may include all or the key land and water portion of an estuary, and adjacent transitional areas and uplands constituting to the extent feasible a natural unit, and which is set aside as a natural field laboratory to provide long-term opportunities for research, education, and interpretation on the ecological relationships within the area (see 16 U.S.C. 1453(8)) and meets the requirements of 16 U.S.C. 1461(b). This includes those areas designated as national estuarine sanctuaries under section 315 of the Act prior to the date of the enactment of the Coastal Zone Management Reauthorization Act of 1985 and each area subsequently designated as a national estuarine research reserve.

§ 921.3 National Estuarine Reserve Research System biogeographic classification scheme and estuarine typologies.

(a) National estuarine research reserves are chosen to reflect regional differences and to include a variety of ecosystem types. A biogeographic classification scheme based on regional variations in the nation's coastal zone has been developed. The biogeographic classification scheme is used to ensure that the National Estuarine Reserve Research System includes at least one site from each region. The estuarine typology system is utilized to ensure that sites in the System reflect the wide range of estuarine types within the United States.

(b) The biogeographic classification scheme, presented in Appendix I to this part, contains 27 regions. Figure 2 graphically depicts the biogeographic regions of the United States.

(c) The typology system is presented in Appendix II to this part.

§ 921.4 Relationship to other provisions of the Coastal Zone Management Act.

(a) The National Estuarine Reserve Research System is intended to provide information to state agencies and other entities involved in addressing coastal management issues. Any coastal state, including those that do not have approved coastal zone management programs under section 306 of the Act, is eligible for an award under the National Estuarine Reserve Research System (see § 921.2(c)).

(b) For purposes of consistency review by states with a federally approved coastal zone management program, the designation of a national estuarine research reserve is deemed to be a Federal activity, which, if directly affecting the state's coastal zone, must be undertaken in a manner consistent to the maximum extent practicable with the approved state coastal zone program as provided by section 1456(c)(1) of the Act, and implementing regulations at 15 CFR part 930, subpart C. In accordance with section 1456(c)(1) of the Act and the applicable regulations NOAA will be responsible for certifying that designation of the reserve is consistent with the State approved coastal zone management program. The State must concur with or object to the certification. It is recommended that the lead State agency for reserve designation consult at the earliest practicable time, with the appropriate State officials concerning the consistency of the proposed national estuarine research reserve.

(c) The National Estuarine Research Reserve Program will be administered in close coordination with the National Marine Sanctuary Program (Title III of the Marine Protection Research and Sanctuaries Act, as amended, 16 U.S.C. 1431-1445), also administered by NOAA. Title III authorizes the Secretary of Commerce to designate discrete areas of the marine environment as marine sanctuaries to protect or restore such areas for their conservation, recreational, ecological, historical, research, educational or esthetic values. National marine sanctuaries and estuarine research reserves may not overlap, though they may be adjacent.

Subpart B—Site Selection, Post Site Selection and Management Plan Development

§ 921.10 General.

(a) A state may apply for Federal financial assistance for the purpose of site selection, preparation of documents specified in § 921.13 (draft management plan and environmental impact statement (EIS)) and the conduct of research necessary to complete basic characterization studies. The total Federal share of this group of predesignation awards may not exceed $100,000, of which up to $25,000 may be used for site selection as described in § 921.11. Federal financial assistance for preacquisition activities under § 921.11 and § 921.12 is subject to the total $4 million for which each reserve is eligible for land acquisition. In the case of a biogeographic region (see Appendix I to this part) shared by two or more states, each state is eligible for Federal financial assistance to establish a national estuarine research reserve within their respective portion of the shared biogeographic region. Financial assistance application procedures are specified in subpart I of this part.

(b) In developing a research reserve program, a state may choose to develop a multiple-site research reserve reflecting a diversity of habitats in a single biogeographic region. A multiple-site research reserve also allows the state to develop complementary research and educational programs within the individual components of its multi-site research reserve. Multiple-site research reserves are treated as one reserve in terms of financial assistance and development of an overall management framework and plan. Each individual site of a proposed multiple-site research reserve shall be evaluated both separately under § 921.11(c) and collectively as part of the site selection process. A state may propose to establish a multiple-site research reserve at the time of the initial site selection, or at any point in the development or operation of the estuarine research reserve, even after Federal funding for the single site research reserve has expired. If the state decides to develop a multiple-site national estuarine research reserve after the initial acquisition and development award is made for a single site, the proposal is subject to the requirements set forth in § 921.33(b). However, a state may not propose to add one or more sites to an already designated research reserve if the operation and management of such research reserve has been found deficient and uncorrected or the research conducted is not consistent with the Estuarine Research Guidelines in accordance with the provisions of subparts E and F of this part. In addition, Federal funds acquisition of a multiple-site research reserve remains limited to $4,000,000 (see § 921.20). The funding for operation of a multiple-site research reserve is limited to $70,000 per year (see § 921.32(c)) and preacquisition funds are limited to $100,000 per reserve.

§ 921.11 Site selection.

(a) A state may use up to $25,000 in Federal funds to establish and implement a site selection process which is approved by NOAA .

(b) In addition to the requirements set forth in subpart I of this part, a request for Federal funds for site selection must contain the following programmatic information:

(1) A description of the proposed site selection process and how it will be implemented in conformance with the biogeographic classification scheme and typology (§ 921.3);

(2) An identification of the site selection agency and the potential management agency; and

(3) A description of how public participation will be incorporated into the process (see § 921.11(d)).

(c) As part of the site selection process, the state and NOAA shall evaluate and select the final site(s). NOAA has final authority in approving such sites.

Site selection shall be guided by the following principles:

(1) The site's contribution to the biogeographical and typological balance of the National Estuarine Reserve Research System. NOAA will give priority consideration to proposals to establish reserves in biogeographic regions or subregions that are not represented in the system (see the biogeographic classification scheme and typology set forth in § 921.3 and appendices I and II to this part);

(2) The site's ecological characteristics, including its biological productivity, diversity of flora and fauna, and capacity to attract a broad range of research and educational interests. The proposed site must be a representative estuarine ecosystem and should, to the maximum extent possible, be an estuarine ecosystem minimally affected by human activity or influence (see § 921.1(e));

(3) Assurance that the site's boundaries encompass an adequate portion of the key land and water areas of the natural system to approximate an ecological unit and to ensure effective conservation. Boundary size will vary greatly depending on the nature of the ecosystem. Research reserve boundaries must encompass the area within which adequate control has or will be established by the managing entity over human activities occurring within the reserve. Generally, reserve boundaries will encompass two areas: key land and water areas (or "core area") and a buffer zone. Key land and water areas and a buffer zone will likely require significantly different levels of control (see § 921.13(a)(7)). The term "key land and water areas" refers to that core area within the reserve that is so vital to the functioning of the estuarine ecosystem that it must be under a level of control sufficient to ensure the long-term viability of the reserve for research on natural processes. Key land and water areas, which comprise the core area, are those ecological units of a natural estuarine system which preserve, for research purposes, a full range of significant physical, chemical and biological factors contributing to the diversity of fauna, flora and natural processes occurring within the estuary. The determination of which land and water areas are "key" to a particular reserve must be based on specific scientific knowledge of the area. A basic principle to follow when deciding upon key land and water areas is that they should encompass resources representative of the total ecosystem, and which if compromised could endanger the research objectives of the reserve. The term "buffer zone" refers to an area adjacent to or surrounding key land and water areas and essential to their integrity. Buffer zones protect the core area and provide additional protection for estuarine-dependent species, including those that are rare or endangered. When determined appropriate by the state and approved by NOAA, the buffer zone may also include an area necessary for facilities required for research and interpretation. Additionally, buffer zones should be established sufficient to accommodate a shift of the core area as a result of biological, ecological or geomorphological change which reasonably could be expected to occur. National estuarine research reserves may include existing Federal or state lands already in a protected status where mutual benefit can be enhanced. However, NOAA will not approve a site for potential national estuarine research reserve status that is dependent primarily upon the inclusion of currently protected Federal lands in order to meet the requirements for research reserve status (such as key land and water areas). Such lands generally will be included within a research reserve to serve as a buffer or for other ancillary purposes;

(4) The site's suitability for long-term estuarine research, including ecological factors and proximity to existing research facilities and educational institutions;

(5) The site's compatibility with existing and potential land and water uses in contiguous areas as well as approved coastal and estuarine management plans; and

(6) The site's importance to education and interpretive efforts, consistent with the need for continued protection of the natural system.

(d) Early in the site selection process the state must seek the views of affected landowners, local governments, other state and Federal agencies and other parties who are interested in the area(s) being considered for selection as a potential national estuarine research reserve. After the local government(s) and affected landowner(s) have been contacted, at least one public meeting shall be held in the area of the proposed site. Notice of such a meeting, including the time, place, and relevant subject matter, shall be announced by the state through the area's principal news media at least 15 days prior to the date of the meeting and by NOAA in the FEDERAL REGISTER.

(e) A state request for NOAA approval of a proposed site (or sites in the case of a multi-site reserve) must contain a description of the proposed site in relationship to each of the site selection principles (§ 921.11(c)) and the following information:

(1) An analysis of the proposed site based on the biogeographical scheme/typology discussed in § 921.3 and set forth in appendices I and II to this part;

(2) A description of the proposed site and its major resources, including location, proposed boundaries, and adjacent land uses. Maps, including aerial photographs, are required;

(3) A description of the public participation process used by the state to solicit the views of interested parties, a summary of comments, and, if interstate issues are involved, documentation that the Governor(s) of the other affected state(s) has been contacted. Copies of all correspondence, including contact letters to all affected landowners must be appended;

(4) A list of all sites considered and a brief statement of the basis for not selecting the non-preferred sites; and

(5) A nomination of the proposed site(s) for designation as a National Estuarine Research Reserve by the Governor of the coastal state in which the area is located.

§ 921.12 Post site selection.

(a) At the time of the state's request for NOAA approval of a proposed site, the state may submit a request for up to $40,000 of the total $100,000 allowed for predesignation funds to develop the draft management plan and for the collection of the information necessary for preparation of the environmental impact statement. At this time, the state may also submit a request for the remainder of the predesignation funds for research necessary to complete a basic characterization of the physical, chemical and biological characteristics of the site approved by NOAA. The state's request for these post site selection funds must be accompanied by the information specified in subpart I of this part and, for draft management plan development and environmental impact statement information collection, the following programmatic information:

(1) A draft management plan outline (see § 921.13(a) below); and

(2) An outline of a draft memorandum of understanding (MOU) between the state and NOAA detailing the Federal-state role in research reserve management during the initial period of Federal funding and expressing the state's long-term commitment to operate and manage the national estuarine research reserve.

(b) The state is eligible to use the funds referenced in § 921.12(a) after the proposed site is approved by NOAA under the terms of § 921.11.

§ 921.13 Management plan and environmental impact statement development.

(a) After NOAA approves the state's proposed site, the state may request to use additional predesignation funds for draft management plan development and the collection of information necessary for the preparation by NOAA of the environmental impact statement. The state shall develop a draft management plan, including an MOU. The plan will set out in detail:

(1) Research reserve goals and objectives, management issues, and strategies or actions for meeting the goals and objectives;

(2) An administrative section including staff roles in administration, research, education/interpretation, and surveillance and enforcement;

(3) A research plan, including a monitoring design;

(4) An education/interpretive plan;

(5) A plan for public access to the research reserve;

(6) A construction plan, including a proposed construction schedule, general descriptions of proposed developments and preliminary drawings, if appropriate. Information should be provided for proposed minor construction projects in sufficient detail to allow these projects to begin in the initial phase of acquisition and development. If a visitor center, research center or any other facilities are proposed for construction or renovation at the site, or restorative activities which require significant construction are planned, a detailed construction plan including preliminary cost estimates and architectural drawings must be prepared as a part of the final management plan; and

(7) An acquisition plan identifying the ecologically key land and water areas of the research reserve, ranking these areas according to their relative importance, and including a strategy for establishing adequate long-term state control over these areas sufficient to provide protection for reserve resources to ensure a stable environment for research. This plan must include an identification of ownership within the proposed research reserve boundaries, including land already in the public domain; the method(s) of acquisition which the state proposes to use—acquisition (including less-than-fee simple options) to establish adequate long-term state control; an estimate of the fair market value of any property interest—which is proposed for acquisition; a schedule estimating the time required to complete the process of establishing adequate state control of the proposed research reserve; and a discussion of any anticipated problems. In selecting a preferred method(s) for establishing adequate state control over areas within the proposed boundaries of the reserve, the state shall perform the following steps for each parcel determined to be part of the key land and water areas (control over which is necessary to protect the integrity of the reserve for research purposes), and for those parcels required for research and interpretive support facilities or buffer purposes:

(i) Determine, with appropriate justification, the minimum level of control(s) required (*e.g.*, management agreement, regulation, less-than-fee simple property interest (*e.g.*, conservation easement), fee simple property acquisition, or a combination of these approaches;

(ii) Identify the level of existing state control(s);

(iii) Identify the level of additional state control(s), if any, necessary to meet the minimum requirements identified in (a)(7)(i); of this section;

(iv) Examine all reasonable alternatives for attaining the level of control identified in (a)(7)(iii) of this section, and perform a cost analysis of each; and

(v) Rank, in order of cost, the methods (including acquisition) identified in paragraph (a)(7)(iv) of this section.

An assessment of the relative cost-effectiveness of control alternatives shall include a reasonable estimate of both short-term costs (*e.g.*, acquisition of property interests, regulatory program development including associated enforcement costs, negotiation, adjudication, etc.) and long-term costs (*e.g.*, monitoring, enforcement, adjudication, management and coordination). In selecting a preferred method(s) for establishing adequate state control over each parcel examined under the process described above, the state shall give priority consideration to the least costly method(s) of attaining the minimum level of long-term control required. Generally, with the possible exception of buffer areas required for support facilities, the level of control(s) required for buffer areas will be considerably less than that required for key land and water areas. This acquisition plan, after receiving the approval of NOAA, shall serve as a guide for negotiations with landowners. A final boundary for the reserve shall be delineated as a part of the final management plan;

(8) A resource protection plan detailing applicable authorities, including allowable uses, uses requiring a permit and permit requirements, any restrictions on use of the research reserve, and a strategy for research reserve

surveillance and enforcement of such use restrictions, including appropriate government enforcement agencies;

(9) If applicable, a restoration plan describing those portions of the site that may require habitat modification to restore natural conditions;

(10) A proposed memorandum of understanding (MOU) between the state and NOAA regarding the Federal-state relationship during the establishment and development of the national estuarine research reserve, and expressing a long-term commitment by the state to maintain and manage the research reserve in accordance with section 315 of the Act 16 U.S.C. 1461, and applicable regulations. In conjunction with the MOU and where possible under state law, the state will consider taking appropriate administrative or legislative action to ensure the long-term protection and operation of the national estuarine research reserve. The MOU shall be signed prior to research reserve designation. If other MOUs are necessary (such as with a Federal agency or another state agency), drafts of such MOUs also must be included in the plan; and

(11) If the state has a federally approved coastal zone management program, documentation that the proposed national estuarine research reserve is consistent to the maximum extent practicable with that program. See § 921.4(b) and § 921.30(b).

(b) Regarding the preparation of an environmental impact statement (EIS) under the National Environmental Policy Act on a national estuarine research reserve proposal, the state shall provide all necessary information to NOAA concerning the socioeconomic and environmental impacts associated with implementing the draft management plan and feasible alternatives to the plan. Based on this information, NOAA will prepare the draft EIS.

(c) Early in the development of the draft management plan and the draft EIS, the state shall hold a meeting in the area or areas most affected to solicit public and government comments on the significant issues related to the proposed action. NOAA will publish a notice of the meeting in the FEDERAL REGISTER 15 days prior to the meeting. The state shall be responsible for publishing a similar notice in the local media.

(d) NOAA will publish a FEDERAL REGISTER notice of intent to prepare a draft EIS. After the draft EIS is prepared and filed with the Environmental Protection Agency (EPA), a Notice of Availability of the DEIS will appear in the FEDERAL REGISTER. Not less than 30 days after publication of the notice, NOAA will hold at least one public hearing in the area or areas most affected by the proposed national estuarine research reserve. The hearing will be held no sooner than 15 days after appropriate notice of the meeting has been given in the principal news media and in the FEDERAL REGISTER by NOAA and the state, respectively. After a 45-day comment period, a final EIS will be prepared by NOAA.

Subpart C—Acquisition, Development, and Preparation of the Final Management Plan

§ 921.20 General.

The acquisition and development period is separated into two major phases. After NOAA approval of the site, draft management plan and draft MOU, and completion of the final EIS, a state is eligible for an initial acquisition and development award(s). In this initial phase, the state should work to meet the criteria required for formal research reserve designation; *e.g.*, establishing adequate state control over the key land and water areas as specified in the draft management plan and preparing the final management plan. These requirements are specified in § 921.30. Minor construction in accordance with the draft management plan may also be conducted during this initial phase. The initial acquisition and development phase is expected to last no longer than three years. If necessary, a longer time period may be negotiated between the state and NOAA. After research reserve designation, a state is eligible for a supplemental acquisition and development award(s) in accordance with § 921.31. In this post-designation acquisition and development phase, funds may be used in accordance with the final management plan to construct research and educational facilities, complete any remaining land acquisition, and for restorative activities identified in the final management plan. In any case, the amount of Federal financial assistance provided to a coastal state with respect to the acquisition of lands and waters, or interests therein, for any one national estuarine research reserve may not exceed an amount equal to 50 percent of the costs of the lands, waters, and interests therein or $4,000,000, whichever amount is less. The amount of Federal assistance for development and construction activities is $1,500,000.

§ 921.21 Initial acquisition and development awards.

(a) Assistance is provided to aid the recipient in:

(1) Acquiring a fee simple or less-than-fee simple real property interest in land and water areas to be included in the research reserve boundaries (see § 921.13(a)(7); § 921.30(d));

(2) Minor construction, as provided in paragraphs (b) and (c) of this section;

(3) Preparing the final management plan; and

(4) Up to the point of research reserve designation, initial management costs, *e.g.*, for implementing the NOAA approved draft management plan, preparing the final management plan, hiring a reserve manager and other staff as necessary and for other management-related activities. Application procedures are specified in subpart I of this part.

(b) The expenditure of Federal and state funds on major construction activities is not allowed during the initial acquisition and development phase. The preparation of architectural and engineering plans, including specifications, for any proposed construction, or for proposed restorative activities, is permitted. In addition, minor construction activities, consistent with paragraph (c) of this section also are allowed. The NOAA-approved draft management plan must, however, include a construction plan and a public access plan before any award funds can be spent on construction activities.

(c) Only minor construction activities that aid in implementing portions of the management plan (such as boat ramps and nature trails) are permitted during the initial acquisition and development phase. No more than five (5) percent of the initial acquisition and development award may be expended on such facilities. NOAA must make a specific determination, based on the final EIS, that the construction activity will not be detrimental to the environment.

(d) Except as specifically provided in paragraphs (a) through (c) of this section, construction projects, to be funded in whole or in part under an acquisition and development award(s), may not be initiated until the research reserve receives formal designation (see § 921.30). This requirement has been adopted to ensure that substantial progress in establishing adequate state control over key land and waters areas has been made and that a final management plan is completed before major sums are spent on construction. Once substantial progress in establishing adequate state control/acquisition has been made, as defined by the state in the management plan, other activities guided by the final management plan may begin with NOAA's approval.

(e) For any real property acquired in whole or part with Federal funds for the research reserve the state shall execute suitable title documents to include substantially the following provisions, or otherwise append the following provisions in a manner acceptable under applicable state law to the official land record(s):

(1) Title to the property conveyed by this deed shall vest in the [recipient of the award granted pursuant to section 315 of the Act, 16 U.S.C. 1461 or other NOAA approved state agency] subject to the condition that the designation of the [name of National Estuarine Reserve] is not withdrawn and the property remains part of the federally designated [name of National Estuarine Research Reserve].

(2) In the event that the property is no longer included as part of the research reserve, or if the designation of the research reserve of which it is part is withdrawn, then NOAA or its successor agency, after full and reasonable consultation with the State, may

exercise the following rights regarding the disposition of the property:

(i) The recipient may retain title after paying the Federal Government an amount computed by applying the Federal percentage of participation in the cost of the original project to the current fair market value of the property;

(ii) If the recipient does not elect to retain title, the Federal Government may either direct the recipient to sell the property and pay the Federal Government an amount computed by applying the Federal percentage of participation in the cost of the original project to the proceeds from the sale (after deducting actual and reasonable selling and repair or renovation expenses, if any, from the sale proceeds), or direct the recipient to transfer title to the Federal Government. If directed to transfer title to the Federal Government, the recipient shall be entitled to compensation computed by applying the recipient's percentage of participation in the cost of the original project to the current fair market value of the property;

(iii) Fair market value of the property must be determined by an independent appraiser and certified by a responsible official of the state, as provided by Department of Commerce Regulations in 15 CFR part 24, and Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally assisted programs in 15 CFR part 11.

(f) Upon instruction by NOAA, provisions analogous to those of § 921.21(e) shall be included in the documentation underlying less-than-fee-simple interests acquired in whole or part with Federal funds.

(g) Federal funds or non-Federal matching share funds shall not be spent to acquire a real property interest in which the State will own the land concurrently with another entity unless the property interest has been identified as a part of an acquisition strategy pursuant to § 921.13(7) which has been approved by NOAA prior to the effective date of these regulations.

(h) Prior to submitting the final management plan to NOAA for review and approval, the state shall hold a public meeting to receive comment on the plan in the area affected by the estuarine research reserve. NOAA will publish a notice of the meeting in the FEDERAL REGISTER. The state shall be responsible for having a similar notice published in the local media.

Subpart D—Reserve Designation and Subsequent Operation

§ 921.30 Designation of National Estuarine Research Reserves.

(a) The Under Secretary may designate an area as a national estuarine research reserve pursuant to section 315 of the Act, if based on written findings the state has met the following requirements:

(1) The Governor of the coastal state in which the area is located has nominated the area for designation as a national estuarine research reserve;

(2) The area is a representative estuarine ecosystem that is suitable for long-term research and contributes to the biogeographical and typological balance of the System;

(3) Key land and water areas of the proposed research reserve, as identified in the management plan, are under adequate state control sufficient to provide long-term protection for reserve resources and to ensure a stable environment for research;

(4) Designation of the area as a reserve will serve to enhance public awareness and understanding of estuarine areas, and provide suitable opportunities for public education and interpretation;

(5) A final management plan has been approved by NOAA and contains the signed copy of the designation findings;

(6) An MOU has been signed between the state and NOAA ensuring a long-term commitment by the state to the effective operation and implementation of the national estuarine research reserve; and

(7) The coastal state in which the area is located has complied with the requirements of these regulations.

(b) NOAA will determine whether the designation of a national estuarine research reserve in a state with a federally approved coastal zone management program directly affects the coastal zone. If the designation is found to directly affect the coastal zone, NOAA will make a consistency determination pursuant to section 307(c)(1) of the Act, 16 U.S.C. 1456, and 15 CFR part 930, subpart C. See § 921.4(b). The results of this consistency determination will be published in the FEDERAL REGISTER when a notice of designation is published. See § 921.30(c).

(c) NOAA will cause a notice of designation of a national estuarine research reserve to be placed in the FEDERAL REGISTER. The state shall be responsible for having a similar notice published in the local media.

(d) The term "state control" in § 921.30(a)(3) does not necessarily require that key land and water areas be owned by the state in fee simple. Acquisition of less-than-fee-simple interests (*e.g.*, conservation easements) and utilization of existing State regulatory measures are encouraged where the state can demonstrate that these interests and measures assure adequate long-term State control consistent with the purposes of the research reserve (see also § 921.13(a)(7); § 921.21(g)). Should the state later elect to purchase an interest in such lands using NOAA funds, adequate justification as to the need for such acquisition must be provided to NOAA.

§ 921.31 Supplemental acquisition and development awards.

After national estuarine research reserve designation, and as specified in the approved management plan, the state may request a supplemental acquisition and/or development award(s) for acquiring additional property interests identified in the management plan as necessary to enhance long-term protection of the area for research and education, for facility construction, for restorative activities identified in the approved management plan, and for administrative purposes. The amount of Federal financial assistance provided for supplemental development costs directly associated with facility construction other than land acquisition (*i.e.*, major construction activities) for any one national estuarine research reserve may not exceed $1,500,000 and must be matched by the state on a 50/50 basis. Supplemental acquisition awards for the acquisition of lands or waters, or interests therein, for any one National Estuarine Reserve may not exceed an amount equal to 50 per centum of the cost of the lands, waters, and interests therein or $4,000,000 whichever amount is less. In the case of a biogeographic region (see Appendix I to this part) shared by two or more states, each state is eligible for Federal financial assistance to establish a national estuarine research reserve within their respective portion of the shared biogeographic region. Application procedures are specified in subpart I of this part. Land acquisition must follow the procedures specified in § 921.13(a)(7), § 921.21 (e) and (f) and § 921.81.

§ 921.32 Operation and management: Implementation of the management plan.

(a) After the national estuarine research reserve is formally designated, the state is eligible to receive Federal funds to assist the state in the operation and management of the research reserve. The purpose of this Federally funded operation and management phase is to implement the approved final management plan and to take the necessary steps to ensure the continued effective operation of the research reserve.

(b) State operation and management of national estuarine research reserves shall be consistent with the mission, and shall further the goals, of the National Estuarine Research Reserve System (see § 921.1).

(c) Federal funds of up to $70,000 per year, to be matched by the state on a 50/50 basis, are available for the operation and management of the national estuarine research reserve, including the establishment and operation of a basic environmental monitoring program. In the case of a biogeographic region (see appendix I to this part) shared by two or more states, each state is eligible for Federal financial assistance to establish a national estuarine research reserve within their respective portion of the shared biogeographic region (see § 921.10).

(d) Operation and management funds are subject to the following limitations:

(1) No more than $70,000 in Federal funds may be expended in a twelve month award period (*i.e.*, Federal funds for operation and management may not be expended at a rate greater than $70,000 per year);

(2) No more than ten percent of the total amount (state and Federal shares) of each operation and management award may be used for construction-type activities (*i.e.*, $14,000 maximum per year).

§ 921.33 Boundary changes, amendments to the management plan, and addition of multiple-site components.

(a) Changes in research reserve boundaries and major changes to the final management plan, including state laws or regulations promulgated specifically for the research reserve, may be made only after written approval by NOAA. If determined to be necessary, NOAA may require public notice, including notice in the FEDERAL REGISTER and an opportunity for public comment. Changes in the boundaries of the research reserve involving the acquisition of properties not listed in the management plan or final EIS require public notice and the opportunity for comment; in certain cases, an environmental assessment and possibly, an environmental impact statement, may be required. Where public notice is required, NOAA will place a notice in the FEDERAL REGISTER of any proposed changes in research reserve boundaries or proposed major changes to the final management plan. The state shall be responsible for publishing an equivalent notice in the local media. See also requirements of § 921.4(b) and § 921.13(a)(11).

(b) As discussed in § 921.10(b), a state may choose to develop a multiple-site national estuarine research reserve after the initial acquisition and development award for a single site has been made. Public notice of the proposed addition will be placed by NOAA in the FEDERAL REGISTER. The state shall be responsible for publishing an equivalent notice in the local media. An opportunity for comment, in addition to the preparation of either an environmental assessment or environmental impact statement on the proposal, will also be required. An environmental impact statement, if required, shall be prepared in accordance with section § 921.13 and shall include an administrative framework for the multiple-site research reserve and a description of the complementary research and educational programs within the research reserve. If NOAA determines, based on the scope of the project and the issues associated with the additional site, that an environmental assessment is sufficient to establish a multiple-site research reserve, then the state shall develop a revised management plan which, concerning the additional component, incorporates each of the elements described in § 921.13(a). The revised management plan shall address goals and objectives for all components of the multi-site research reserve and the additional component's relationship to the original site(s).

Subpart E—Performance Evaluation and Withdrawal of Designation

§ 921.40 Evaluation of system performance.

(a) Following designation of a national estuarine research reserve pursuant to § 921.30, periodic performance evaluations shall be conducted concerning the operation and management of each national estuarine research reserve, including the research and monitoring being conducted within the reserve and education and interpretive activities. Evaluations may assess performance in all aspects of research reserve operation and management or may be limited in scope, focusing on selected issues of importance. Performance evaluations in assessing research reserve operation and management may also examine whether a research reserve is in compliance with the requirements of these regulations, particularly whether:

(1) The operation and management of the research reserve is consistent with and furthers the mission and goals of the National Estuarine Reserve Research System (see § 921.1); and

(2) A basis continues to exist to support any one or more of the findings made under § 921.30(a).

(b) Generally, performance will be evaluated at least every three years. More frequent evaluations may be scheduled as determined to be necessary by NOAA.

(c) Performance evaluations will be conducted by Federal officials. When determined to be necessary, Federal and non-Federal experts in natural resource management, estuarine research, interpretation or other aspects of national estuarine research reserve operation and management may be requested by NOAA to participate in performance evaluations. If other experts are to be included in the evaluation, NOAA will first ask the state to recommend appropriate individuals to serve in that capacity.

(d) Performance evaluations will be conducted in accordance with the procedural and public participation provisions of the CZMA regulations on review of performance at 15 CFR part 928 (*i.e.*, § 928.3(b) and § 928.4).

(e) To ensure effective Federal oversight of each research reserve within the National Estuarine Reserve Research System the state is required to submit an annual report on operation and management of the research reserve during the immediately preceding state fiscal year. This annual report must be submitted within a ninety day period following the end of the state fiscal year. The report shall detail program successes and accomplishments, referencing the research reserve management plan and, as appropriate, the work plan for the previous year. A work plan, detailing the projects and activities to be undertaken over the coming year to meet the goals and objectives of the research reserve as described in the management plan and the state's role in ongoing research reserve programs, shall also be included.

§ 921.41 Suspension of eligibility for financial assistance.

(a) If a performance evaluation under § 921.40 reveals that the operation and management of the research reserve is deficient, or that the research being conducted within the reserve is not consistent with the Estuarine Research Guidelines referenced in subpart F of this part, the eligibility of the research reserve for Federal financial assistance as described in these regulations may be suspended until the deficiency or inconsistency is remedied.

(b) NOAA will provide the state with a written notice of the deficiency or inconsistency. This notice will explain the finding, assess the Federal role in contributing to the problem, propose a solution or solutions, provide a schedule by which the state should remedy the deficiency or inconsistency, and state whether the state's eligibility for Federal financial assistance has been suspended in whole or part. In this notice the state shall also be advised that it may comment on this finding and meet with NOAA officials to discuss the results of the performance evaluation and seek to remedy the deficiency or inconsistency.

(c) Eligibility of a research reserve for financial assistance under these regulations shall be restored upon written notice by NOAA to the state that the deficiency or inconsistency has been remedied.

(d) If, after a reasonable time, a state does not remedy a deficiency in the operation and management of a national estuarine research reserve which has been identified pursuant to a performance evaluation under § 921.40(a), such outstanding deficiency shall be considered a basis for withdrawal of designation (see § 921.42).

§ 921.42 Withdrawal of designation.

(a) Designation of an estuarine area as a national estuarine research reserve may be withdrawn if a performance evaluation conducted pursuant to § 921.40 reveals that:

(1) The basis for any one or more of the findings made under § 921.30(a) in designating the research reserve no longer exists;

(2) A substantial portion of the research conducted within the research reserve, over a period of years, has not been consistent with the Estuarine Research Guidelines referenced in subpart F of this part; or

(3) A state, after a reasonable time, has not remedied a deficiency in the operation and management of a research reserve identified pursuant to an earlier performance evaluation conducted under § 921.40.

(b) If a basis is found under § 921.42(a) for withdrawal of designation, NOAA will provide the state with a written notice of this finding. This notice will explain the basis for the finding, propose a solution or solutions and provide a schedule by which the state should correct the deficiency. In this notice, the state shall also be advised that it may comment on the finding and meet with NOAA officials to discuss the finding and seek to correct the deficiency.

(c) If, within a reasonable period of time, the deficiency is not corrected in a manner acceptable to NOAA, a notice of intent to withdraw designation, with an opportunity for comment, will be placed in the FEDERAL REGISTER.

(d) The state shall be provided the opportunity for an informal hearing before the Under Secretary to consider NOAA's finding of deficiency and intent to withdraw designation, as well as the state's comments on and response to NOAA's written notice pursuant to § 921.42(b) and FEDERAL REGISTER notice pursuant to § 921.42(c).

(e) Within 30 days after the informal hearing, the Under Secretary shall issue a written decision regarding the designation status of the national estuarine research reserve. If a decision is made to withdraw research reserve designation, the procedures specified in § 921.21(e) regarding the disposition of real property acquired in whole or part with Federal funds shall be followed.

(f) NOAA may not withdraw designation of a national estuarine research reserve if the performance evaluation reveals that the deficiencies in management of the site are a result of inadequate Federal financial support.

Subpart F—Research

§ 921.50 General.

(a) To stimulate high quality research within designated national estuarine research reserves, NOAA may provide financial support for research which is consistent with the Estuarine Research Guidelines referenced in § 921.51. Research awards may be awarded under this subpart to only those designated research reserves with approved final management plans with the following exception: NOAA may award research awards under this subpart to reserves without final management plans that have been designated prior to the effective date of these regulations; in the absence of an approved final management plan, however these reserves will be eligible for research awards during only the first two years after the effective date of these regulations. Although this research may be conducted within the immediate watershed of the research reserve, the majority of research activities of any single research project funded under this subpart must be conducted within reserve boundaries. Research funds are primarily used to support management-related research that will enhance scientific understanding of the research reserve ecosystem, provide information needed by reserve managers and coastal management decision-makers, and improve public awareness and understanding of estuarine ecosystems and estuarine management issues. Research projects may be oriented to specific research reserves; however, research projects that would benefit more than one research reserve in the National Estuarine Reserve Research System are encouraged.

(b) Federal research funds under this subpart are not intended as a source of continuous funding for a particular project over time. Research funds may be used to support start-up costs for long-term projects if an applicant can identify an alternative source of long-term research support.

(c) Research funds are available on a competitive basis to any coastal state or qualified public or private person. A notice of available funds will be published in the FEDERAL REGISTER. Research funds are provided in addition to any other funds available to a coastal state under the Act. Federal research funds provided under this subpart must be matched equally by the recipient, consistent with § 921.81(e)(4) ("allowable costs").

§ 921.51 Estuarine research guidelines.

(a) Research within the National Estuarine Reserve Research System shall be conducted in a manner consistent with Estuarine Research Guidelines developed by NOAA.

(b) A summary of the Estuarine Research Guidelines is published in the FEDERAL REGISTER as a part of the notice of available funds discussed in § 921.50(c).

(c) The Estuarine Research Guidelines are reviewed annually by NOAA. This review will include an opportunity for comment by the estuarine research community.

§ 921.52 Promotion and coordination of estuarine research.

(a) NOAA will promote and coordinate the use of the National Estuarine Reserve Research System for research purposes.

(b) NOAA will, in conducting or supporting estuarine research other than that authorized under section 315 of the Act, give priority consideration to research that uses the National Estuarine Reserve Research System.

(c) NOAA will consult with other Federal and state agencies to promote use of one or more research reserves within the National Estuarine Reserve Research System when such agencies conduct estuarine research.

Subpart G—Monitoring

§ 921.60 General.

(a) To provide a systematic basis for developing a high quality estuarine resource and ecosystem information base for national estuarine research reserves and, as a result, for the System, NOAA may provide financial support for monitoring programs. Monitoring funds are used to support three major phases of a monitoring program; studies necessary for comprehensive site description/characterization, development of a site profile, and implementation of a monitoring program.

(b) Monitoring funds are available on a competitive basis to the state agency responsible for reserve management or qualified public or private person or entity designated by the Reserve. However, if the applicant is other than the managing entity of a reserve research (coastal state), that applicant must submit as a part of the application a letter from the reserve manager indicating formal support of the application by the managing entity of the reserve. Monitoring awards will be made on the basis of a five-year performance period; and with initial funding for a twelve (12) month period; and with annual supplemental funding contingent on performance and appropriations under the Act. Monitoring funds are provided in addition to any other funds available to a coastal state under the Act. Federal monitoring funds must be matched equally by the recipient, consistent with § 921.81(e)(4) ("allowable costs").

(c) Monitoring projects funded under this Subpart must focus on the resources within the boundaries of the research reserve and must be consistent with the applicable sections of the Estuarine Research Guidelines referenced in § 921.51. Portions of the project may occur within the immediate watershed of the Reserve beyond the site boundaries. However, the monitoring proposal must demonstrate why this is necessary for the success of the project.

Subpart H—Interpretation and Education

§ 921.70 General.

(a) To stimulate the development of innovative or creative interpretive and educational projects and materials to enhance public awareness and understanding of estuarine areas, NOAA may fund interpretive and educational activities. Interpretive and educational awards may be awarded under this subpart to only those designated research reserves with approved final management plans with the following exception: NOAA may award research awards under this subpart to reserves without final management plans that have been designated prior to the effective date of these regulations; in the absence of an approved final management plan, however these reserves will be eligible for research awards during only the first two years after the effective date of these regulations.

(b) Educational and interpretive funds are available on a competitive basis to any coastal state entity. However, if the applicant is other than the managing entity of a research reserve, that applicant must submit as a part of the application a letter from the reserve manager indicating formal support of the application by the managing entity of the reserve. These funds are provided in addition to any other funds available to a coastal state under the Act. Federal interpretation and educational funds must be matched equally by the recipient, consistent with § 921.81(e)(4) ("allowable costs").

§ 921.71 Categories of potential interpretive and educational projects; evaluation criteria.

(a) Proposals for interpretive or educational projects will be considered under the following categories:

(1) Design, development and distribution/placement of interpretive or educational media (*i.e.*, the development of tangible items, such as exhibits/displays, publications, posters, signs, audio/visuals, computer software and maps which have an educational or interpretive purpose; and techniques for making available or locating information concerning research reserve resources, activities, or issues);

(2) Development and presentation of curricula, workshops, lectures, seminars, and other structured programs or presentations for facility or field use;

(3) Extension/outreach programs; or

(4) Creative and innovative methods and technologies for implementing interpretive or educational projects.

(b) Interpretive and educational projects may be oriented to one or more research reserves or to the entire system. Those projects which would directly benefit more than one research reserve, and, if practicable, the entire National Estuarine Reserve Research System, shall receive priority consideration for funding.

(c) Proposals for interpretive and educational projects in national estuarine research reserves will be evaluated in accordance with criteria listed below:

(1) Educational or interpretive merits;

(2) Relevance or importance to reserve management or coastal decisionmaking;

(3) Educational quality (*e.g.*, soundness of approach, experience related to methodologies);

(4) Importance to the National Estuarine Reserve Research System;

(5) Budget and Institutional Capabilities (*e.g.*, reasonableness of budget, sufficiency of logistical support); and

(6) In addition, in the case of long-term projects, the ability of the state or the grant recipient to support the project beyond this initial funding.

Subpart I—General Financial Assistance Provisions

§ 921.80 Application information.

(a) Only a coastal state may apply for Federal financial assistance awards for preacquisition, acquisition and development, operation and management, and education and interpretation. Any coastal state or public or private person may apply for Federal financial assistance awards for estuarine research or monitoring. The announcement of opportunities to conduct research in the reserve system appears on an annual basis in the FEDERAL REGISTER. If a state is participating in the national Coastal Zone Management Program, the applicant for an award under section 315 of the Act shall notify the state coastal management agency regarding the application.

(b) An original and two copies of the formal application must be submitted at least 120 working days prior to the proposed beginning of the project to the following address: Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, Universal Building South, 1825 Connecticut Avenue, NW., Suite 714, Washington, DC 20235. The Application for Federal Assistance Standard

Form 424 (Non-construction Program) constitutes the formal application for site selection, post-site selection, operation and management, research, and education and interpretive awards. The Application for Federal Financial Assistance Standard Form 424 (Construction Program) constitutes the formal application for land acquisition and development awards. The application must be accompanied by the information required in subpart B (predesignation) of this part, subpart C of this part and § 921.31 (acquisition and development), and § 921.32 (operation and management) as applicable. Applications for development awards for construction projects, or restorative activities involving construction, must include a preliminary engineering report. All applications must contain back up data for budget estimates (Federal and non-Federal shares), and evidence that the application complies with the Executive Order 12372, "Intergovernmental Review of Federal Programs." In addition, applications for acquisition and development awards must contain:

(1) State Historic Preservation Office comments;

(2) Written approval from NOAA of the draft management plan for initial acquisition and development award(s); and

(3) A preliminary engineering report for construction projects, or restorative activities involving construction.

§ 921.81 Allowable costs.

(a) Allowable costs will be determined in accordance with applicable OMB Circulars and guidance for Federal financial assistance, the financial assistance agreement, these regulations, and other Department of Commerce and NOAA directives. The term "costs" applies to both the Federal and non-Federal shares.

(b) Costs claimed as charges to the award must be reasonable, beneficial and necessary for the proper and efficient administration of the financial assistance award and must be incurred during the award period.

(c) Costs must not be allocable to or included as a cost of any other Federally-financed program in either the current or a prior award period.

(d) General guidelines for the non-Federal share are contained in Department of Commerce Regulations at 15 CFR part 24 and OMB Circular A-110. Copies of Circular A-110 can be obtained from the Marine and Estuarine Management Division; 1825 Connecticut Avenue, NW., Suite 714; Washington, DC 20235. The following may be used in satisfying the matching requirement:

(1) Site Selection and Post Site Selection Awards. Cash and in-kind contributions (value of goods and services directly benefiting and specifically identifiable to this part of the project) are allowable. Land may not be used as match.

(2) Acquisition and Development Awards. Cash and in-kind contributions are allowable. In general, the fair market value of lands to be included within the research reserve boundaries and acquired pursuant to the Act, with other than Federal funds, may be used as match. However, the fair market value of real property allowable as match is limited to the fair market value of a real property interest equivalent to, or required to attain, the level of control over such land(s) identified by the state and approved by the Federal Government as that necessary for the protection and management of the national estuarine research reserve. Appraisals must be performed according to Federal appraisal standards as detailed in Department of Commerce regulations at 15 CFR part 24 and the Uniform Relocation Assistance and Real Property Acquisition for Federal and Federally Assisted Programs in 15 CFR part 11. The fair market value of privately donated land, at the time of donation, as established by an independent appraiser and certified by a responsible official of the state (pursuant to 15 CFR part 24), may also be used as match. Land, including submerged lands already in the state's possession, may be used as match to establish a national estuarine research reserve. The value of match for these state lands will be calculated by determining the value of the benefits foregone by the state, in the use of the land, as a result of new restrictions that may be imposed by Reserve designation. The appraisal of

the benefits foregone must be made by an independent appraiser in accordance with Federal appraisal standards pursuant to 15 CFR part 24 and 15 CFR part 11. A state may initially use as match land valued at greater than the Federal share of the acquisition and development award. The value in excess of the amount required as match for the initial award may be used to match subsequent supplemental acquisition and development awards for the national estuarine research reserve (see also § 921.20). Costs related to land acquisition, such as appraisals, legal fees and surveys, may also be used as match.

(3) Operation and Management Awards. Generally, cash and in-kind contributions (directly benefiting and specifically identifiable to operations and management), except land, are allowable.

(4) Research, Monitoring, Education and Interpretive Awards. Cash and in-kind contributions (directly benefiting and specifically identifiable to the scope of work), except land, are allowable.

§ 921.82 Amendments to financial assistance awards.

Actions requiring an amendment to the financial assistance award, such as a request for additional Federal funds, revisions of the approved project budget or original scope of work, or extension of the performance period must be submitted to NOAA on Standard Form 424 and approved in writing.

APPENDIX I TO PART 921—BIOGEOGRAPHIC CLASSIFICATION SCHEME

Acadian

1. Northern Gulf of Maine (Eastport to the Sheepscot River).
2. Southern Gulf of Maine (Sheepscot River to Cape Cod).

Virginian

3. Southern New England (Cape Cod to Sandy Hook).
4. Middle Atlantic (Sandy Hook to Cape Hatteras).
5. Chesapeake Bay.

Carolinian

6. Northern Carolinas (Cape Hatteras to Santee River).
7. South Atlantic (Santee River to St. John's River).
8. East Florida (St. John's River to Cape Canaveral).

West Indian

9. Caribbean (Cape Canaveral to Ft. Jefferson and south).
10. West Florida (Ft. Jefferson to Cedar Key).

Louisianian

11. Panhandle Coast (Cedar Key to Mobile Bay).
12. Mississippi Delta (Mobile Bay to Galveston).
13. Western Gulf (Galveston to Mexican border).

Californian

14. Southern California (Mexican Border to Point Concepcion).
15. Central California (Point Concepcion to Cape Mendocino).
16. San Francisco Bay.

Columbian

17. Middle Pacific (Cape Mendocino to the Columbia River).
18. Washington Coast (Columbia River to Vancouver Island).
19. Puget Sound.

Great Lakes

20. Western Lakes (Superior, Michigan, Huron).
21. Eastern Lakes (Ontario, Erie).

Fjord

22. Southern Alaska (Prince of Wales Island to Cook Inlet).
23. Aleutian Islands (Cook Inlet to Bristol Bay).

Sub-Arctic

24. Northern Alaska (Bristol Bay to Demarcation Point).

Insular

25. Hawaiian Islands.
26. Western Pacific Island.
27. Eastern Pacific Island.

APPENDIX II TO PART 921—TYPOLOGY OF NATIONAL ESTUARINE RESEARCH RESERVES

This typology system reflects significant differences in estuarine characteristics that are not necessarily related to regional location. The purpose of this type of classification is to maximize ecosystem variety in the selection of national estuarine research reserves. Priority will be given to important ecosystem types as yet unrepresented in the reserve system. It should be noted that any one site may represent several ecosystem types or physical characteristics.

Class I—Ecosystem Types

Group I—Shorelands

A. *Maritime Forest-Woodland:* This type of ecosystem consists of single-stemmed species that have developed under the influence of salt spray. It can be found on coastal uplands or recent features, such as barrier islands and beaches, and may be divided into the following biomes:

1. *Northern Coniferous Forest Biome:* This is an area of predominantly evergreens such as the sitka spruce (Picea), grand fir (Abies), and white cedar (Thuja), with poor development of the shrub and herb layers, but high annual productivity and pronounced seasonal periodicity.

2. *Moist Temperate (Mesothermal) Coniferous Forest Biome:* Found along the west coast of North America from California to Alaska, this area is dominated by conifers, has a relatively small seasonal range, high humidity with rainfall ranging from 30 to 150 inches, and a well-developed understory of vegetation with an abundance of mosses and other moisture-tolerant plants.

3. *Temperate Deciduous Forest Biome:* This biome is characterized by abundant, evenly distributed rainfall, moderate temperatures which exhibit a distinct seasonal pattern, well-developed soil biota and herb and shrub layers, and numerous plants which produce pulpy fruits and nuts. A distant subdivision of this biome is the pine edaphic forest of the southeastern coastal plain, in which only a small portion of the area is occupied by climax vegetation, although it has large areas covered by edaphic climax pines.

4. *Broad-leaved Evergreen Subtropical Forest Biomes:* The main characteristic of this biome is high moisture with less pronounced differences between winter and summer. Examples are the hammocks of Florida and the live oak forests of the Gulf and South Atlantic coasts. Floral dominants include pines, magnolias, bays, hollies, wild tamarind, strangler fig, gumbo limbo, and palms.

B. *Coast Shrublands:* This is a transitional area between the coastal grasslands and woodlands and is characterized by woody species with multiple stems a few centimeters to several meters above the ground developing under the influence of salt spray and occasional sand burial. This includes thickets, scrub, scrub savanna, heathlands, and coastal chaparral. There is a great variety of shrubland vegetation exhibiting regional specificity:

1. *Northern Areas:* Characterized by Hudsonia, various erinaceous species, and thickets of Myrica, Prunus, and Rosa.

2. *Southeast Areas:* Floral dominants include Myrica, Baccharis, and Ilex.

3. *Western Areas:* Adenostoma, Arcotyphylos, and Eucalyptus are the dominant floral species.

C. *Coastal Grasslands:* This area, which possesses sand dunes and coastal flats, has low rainfall (10 to 30 inches per year) and large amounts of humus in the soil. Ecological succession is slow, resulting in the presence of a number of serial stages of community development. Dominant vegetation includes mid-grasses (2 to 4 feet tall), such as Ammophila, Agropyron, and Calamovilfa, tall grasses (5 to 8 feet tall), such as Spartina, and trees such as the willow (Salix sp.), cherry (Prunus sp.), and cottonwood (Populus deltoides). This area is divided into four regions with the following typical strand vegetation:

1. Arctic/Boreal: Elymus;
2. Northeast/West: Ammophila;
3. Southeast/Gulf: Uniola; and
4. Mid-Atlantic/Gulf: Spartina patens.

D. *Coastal Tundra:* This ecosystem, which is found along the Arctic and Boreal coasts of North America, is characterized by low temperatures, a short growing season, and some permafrost, producing a low, treeless mat community made up of mosses, lichens, heath, shrubs, grasses, sedges, rushes, and herbaceous and dwarf woody plants. Common species include arctic/alpine plants such as Empetrum nigrum and Betula nana, the lichens Cetraria and Cladonia, and herbaceous plants such as Potentilla tridentata and Rubus chamaemorus. Common species on the coastal beach ridges of the high arctic desert include Dryas intergrifolia and Saxifrage oppositifolia. This area can be divided into two main subdivisions:

1. *Low Tundra:* characterized by a thick, spongy mat of living and undecayed vegetation, often with water and dotted with ponds when not frozen; and

2. *High Tundra:* a bare area except for a scanty growth of lichens and grasses, with underlying ice wedges forming raised polygonal areas.

E. *Coastal Cliffs:* This ecosystem is an important nesting site for many sea and shore birds. It consists of communities of herbaceous, graminoid, or low woody plants (shrubs, heath, etc.) on the top or along rocky faces exposed to salt spray. There is a diversity of plant species including mosses, lichens, liverworts, and "higher" plant representatives.

Group II—Transition Areas

A. *Coastal Marshes:* These are wetland areas dominated by grasses Poacea), sedges (Cyperaceae), rushes (Juncaceae), cattails (Typhaceae), and other graminoid species and is subject to periodic flooding by either salt or freshwater. This ecosystem may be subdivided into: (a) Tidal, which is periodically flooded by either salt or brackish water; (b) non-tidal (freshwater); or (c) tidal freshwater. These are essential habitats for many important estuarine species of fish and invertebrates as well as shorebirds and waterfowl and serves important roles in shore stabilization, flood control, water purification, and nutrient transport and storage.

B. *Coastal Swamps:* These are wet lowland areas that support mosses and shrubs together with large trees such as cypress or gum.

C. *Coastal Mangroves:* This ecosystem experiences regular flooding on either a daily, monthly, or seasonal basis, has low wave action, and is dominated by a variety of salt-tolerant trees, such as the red mangrove (Rhizophora mangle), black mangrove (Avicennia nitida), and the white mangrove (Laguncularia racemosa). It is also an important habitat for large populations of fish, invertebrates, and birds. This type of ecosystem can be found from central Florida to extreme south Texas to the islands of the Western Pacific.

D. *Intertidal Beaches:* This ecosystem has a distinct biota of microscopic animals, bacteria, and unicellular algae along with microscopic crustaceans, mollusks, and worms with a detritus-based nutrient cycle. This area also includes the driftline communities found at high tide levels on the beach. The dominant organisms in this ecosystem include crustaceans such as the mole crab (Emerita), amphipods (Gammaridae), ghost crabs (Ocypode), and bivalve molluscs such as the coquina (Donax) and surf clams (Spisula and Mactra).

E. *Intertidal Mud and Sand Flats:* These areas are composed of unconsolidated, high organic content sediments that function as a short-term storage area for nutrients and organic carbons. Macrophytes are nearly absent in this ecosystem, although it may be heavily colonized by benthic diatoms, dinoflagellates, filamentous blue-green and green algae, and chemosynthetic purple sulfur bacteria. This system may support a considerable population of gastropods, bivalves, and polychaetes, and may serve as a feeding area for a variety of fish and wading birds. In sand, the dominant fauna include the wedge shell Donax, the scallop Pecten, tellin shells Tellina, the heart urchin Echinocardium, the lug worm Arenicola, sand dollar Dendraster, and the sea pansy Renilla. In mud, faunal dominants adapted to low oxygen levels include the terebellid Amphitrite, the boring clam Playdon, the deep sea scallop Placopecten, the quahog Mercenaria, the echiurid worm Urechis, the mud snail Nassarius, and the sea cucumber Thyone.

F. *Intertidal Algal Beds:* These are hard substrates along the marine edge that are dominated by macroscopic algae, usually thalloid, but also filamentous or unicellular in growth form. This also includes the rocky coast tidepools that fall within the intertidal zone. Dominant fauna of these areas are barnacles, mussels, periwinkles, anemones, and chitons. Three regions are apparent:

1. *Northern Latitude Rocky Shores:* It is in this region that the community structure is best developed. The dominant algal species include Chondrus at the low tide level, Fucus and Ascophyllum at the mid-tidal level, and Laminaria and other kelplike algae just beyond the intertidal, although they can be exposed at extremely low tides or found in very deep tidepools.

2. *Southern Latitudes:* The communities in this region are reduced in comparison to those of the northern latitudes and possesses algae consisting mostly of single-celled or filamentous green, blue-green, and red algae, and small thalloid brown algae.

3. *Tropical and Subtropical Latitudes:* The intertidal in this region is very reduced and contains numerous calcareous algae such as Porolithon and Lithothamnion, as well as green algae with calcareous particles such as Halimeda, and numerous other green, red, and brown algae.

Group III—Submerged Bottoms

A. *Subtidal Hardbottoms:* This system is characterized by a consolidated layer of solid rock or large pieces of rock (neither of biotic origin) and is found in association with geomorphological features such as submarine canyons and fjords and is usually covered with assemblages of sponges, sea fans, bivalves, hard corals, tunicates, and other attached organisms. A significant feature of estuaries in many parts of the world is the oyster reef, a type of subtidal hardbottom. Composed of assemblages of organisms (usually bivalves), it is usually found near an estuary's mouth in a zone of moderate wave action, salt content, and turbidity. If light levels are sufficient, a covering of microscopic and attached macroscopic algae, such as kelp, may also be found.

B. *Subtidal Softbottoms:* Major characteristics of this ecosystem are an unconsolidated layer of fine particles of silt, sand, clay, and gravel, high hydrogen sulfide levels and anaerobic conditions often existing below the surface. Macrophytes are either sparse or absent, although a layer of benthic microalgae may be present if light levels are sufficient. The faunal community is dominated by a diverse population of deposit feeders including polychaetes, bivalves, and burrowing crustaceans.

C. *Subtidal Plants:* This system is found in relatively shallow water (less than 8 to 10 meters) below mean low tide. It is an area of extremely high primary production that provides food and refuge for a diversity of faunal groups, especially juvenile and adult fish, and in some regions, manatees and sea turtles. Along the North Atlantic and Pacific coasts, the seagrass Zostera marina predominates. In the South Atlantic and Gulf coast areas, Thalassia and Diplanthera predominate. The grasses in both areas support a number of epiphytic organisms.

Class II—Physical Characteristics

Group I—Geologic

A. *Basin Type:* Coastal water basins occur in a variety of shapes, sizes, depths, and appearances. The eight basic types discussed below will cover most of the cases:

1. *Exposed Coast:* Solid rock formations or heavy sand deposits characterize exposed ocean shore fronts, which are subject to the full force of ocean storms. The sand beaches are very resilient, although the dunes lying just behind the beaches are fragile and easily damaged. The dunes serve as a sand storage area, making them chief stabilizers of the ocean shorefront.

2. *Sheltered Coast:* Sand or coral barriers, built up by natural forces, provide sheltered areas inside a bar or reef where the ecosystem takes on many characteristics of confined waters—abundant marine grasses, shellfish, and juvenile fish. Water movement is reduced, with the consequent effects of pollution being more severe in this area than in exposed coastal areas.

3. *Bay:* Bays are larger confined bodies of water that are open to the sea and receive strong tidal flow. When stratification is pronounced, the flushing action is augmented by river discharge. Bays vary in size and in type of shorefront.

4. *Embayment:* A confined coastal water body with narrow, restricted inlets and with a significant freshwater inflow can be classified as an embayment. These areas have more restricted inlets than bays, are usually smaller and shallower, have low tidal action, and are subject to sedimentation.

5. *Tidal River:* The lower reach of a coastal river is referred to as a tidal river. The coastal water segment extends from the sea or estuary into which the river discharges to a point as far upstream as there is significant salt content in the water, forming a salt front. A combination of tidal action and freshwater outflow makes tidal rivers well-flushed. The tidal river basin may be a simple channel or a complex of tributaries, small associated embayments marshfronts, tidal flats, and a variety of others.

6. *Lagoon:* Lagoons are confined coastal bodies of water with restricted inlets to the sea and without significant freshwater inflow. Water circulation is limited, resulting in a poorly flushed, relatively stagnant body of water. Sedimentation is rapid with a great potential for basin shoaling. Shores are often gently sloping and marshy.

7. *Perched Coastal Wetlands:* Unique to Pacific islands, this wetland type, found above sea level in volcanic crater remnants, forms as a result of poor drainage characteristics of the crater rather than from sedimentation. Floral assemblages exhibit distinct zonation while the faunal constituents may include freshwater, brackish, and/or marine species. Example: Aunu'u Island, American Samoa.

8. *Anchialine Systems:* These small coastal exposures of brackish water form in lava depressions or elevated fossil reefs, have only a subsurface connection to the ocean, but show tidal fluctuations. Differing from true estuaries in having no surface continuity with streams or ocean, this system is characterized by a distinct biotic community dominated by benthic algae such as Rhizoclonium, the mineral encrusting Schizothrix, and the vascular plant Ruppia maritima. Characteristic fauna, which exhibit a high degree of endemicity, include the mollusks Theodoxus neglectus and T. cariosus, the small red shrimp Metabetaeus lohena and Halocaridina rubra, and the fish Eleotris sandwicensis and Kuhlia sandvicensus. Although found throughout the world, the high islands of the Pacific are the only areas within the U.S. where this system can be found.

B. *Basin Structure:* Estuary Basins may result from the drowning of a river valley (coastal plains estuary), The drowning of a glacial valley (fjord), the occurrence of an offshore barrier (bar-bounded estuary), some tectonic process (tectonic estuary), or volcanic activity (volcanic estuary).

1. *Coastal plains estuary:* Where a drowned valley consists mainly of a single channel, the form of the basin is fairly regular, forming a simple coastal plains estuary. When a channel is flooded with numerous tributaries, an irregular estuary results. Many estuaries of the eastern United States are of this type.

2. *Fjord:* Estuaries that form in elongated, steep headlands that alternate with deep U-shaped valleys resulting from glacial scouring are called fjords. They generally possess rocky floors or very thin veneers of sediment, with deposition generally being restricted to the head where the main river enters. Compared to total fjord volume, river discharge is small. But many fjords have restricted tidal ranges at their mouths, due to sills, or upreaching sections of the bottom which limit free movement of water,

often making river flow large with respect to the tidal prism. The deepest portions are in the upstream reaches, where maximum depths can range from 800 m to 1200 m, while sill depths usually range from 40 m to 150 m.

3. *Bar-bounded Estuary:* These result from the development of an offshore barrier, such as a beach strand, a line of barrier islands, reef formations, a line of moraine debris, or the subsiding remnants of a deltaic lobe. The basin is often partially exposed at low tide and is enclosed by a chain of offshore bars or barrier islands, broken at intervals by inlets. These bars may be either deposited offshore or may be coastal dunes that have become isolated by recent sea level rises.

4. *Tectonic Estuary:* These are coastal indentures that have formed through tectonic processes such as slippage along a fault line (San Francisco Bay), folding, or movement of the earth's bedrock, often with a large inflow of freshwater.

5. *Volcanic Estuary:* These coastal bodies of open water, a result of volcanic processes, are depressions or craters that have direct and/or subsurface connections with the ocean and may or may not have surface continuity with streams. These formations are unique to island areas of volcanic origin.

C. *Inlet Type:* Inlets in various forms are an integral part of the estuarine environment, as they regulate, to a certain extent, the velocity and magnitude of tidal exchange, the degree of mixing, and volume of discharge to the sea. There are four major types of inlets:

1. *Unrestricted:* An estuary with a wide unrestricted inlet typically has slow currents, no significant turbulence, and receive the full effect of ocean waves and local disturbances which serve to modify the shoreline. These estuaries are partially mixed, as the open mouth permits the incursion of marine waters to considerable distances upstream, depending on the tidal amplitude and stream gradient.

2. *Restricted:* Restrictions of estuaries can exist in many forms: bars, barrier islands, spits, sills, and more. Restricted inlets result in decreased circulation, more pronounced longitudinal and vertical salinity gradients, and more rapid sedimentation. However, if the estuary mouth is restricted by depositional features or land closures, the incoming tide may be held back until it suddenly breaks forth into the basin as a tidal wave, or bore. Such currents exert profound effects on the nature of the substrate, turbidity, and biota of the estuary.

3. *Permanent:* Permanent inlets are usually opposite the mouths of major rivers and permit river water to flow into the sea. Sedimentation and deposition are minimal.

4. *Temporary (Intermittent):* Temporary inlets are formed by storms and frequently shift position, depending on tidal flow, the depth of the sea and sound waters, the frequency of storms, and the amount of littoral transport.

D. *Bottom Composition:* The bottom composition of estuaries attests to the vigorous, rapid, and complex sedimentation processes characteristic of most coastal regions with low relief. Sediments are derived through the hydrologic processes of erosion, transport, and deposition carried on by the sea and the stream.

1. *Sand:* Near estuary mouths, where the predominating forces of the sea build spits or other depositional features, the shores and substrates of the estuary are sandy. The bottom sediments in this area are usually coarse, with a graduation toward finer particles in the head of the estuary. In the head region and other zones of reduced flow, fine silty sands are deposited. Sand deposition occurs only in wider or deeper regions where velocity is reduced.

2. *Mud:* At the base level of a stream near its mouth, the bottom is typically composed of loose muds, silt, and organic detritus as a result of erosion and transport from the upper stream reaches and organic decomposition. Just inside the estuary entrance, the bottom contains considerable quantities of sand and mud, which support a rich fauna. Mud flats, commonly built up in estuarine basins, are composed of loose, coarse, and fine mud and sand, often dividing the original channel.

3. *Rock:* Rocks usually occur in areas where the stream runs rapidly over a steep gradient with its coarse materials being derived from the higher elevations where the stream slope is greater. The larger fragments are usually found in shallow areas near the stream mouth.

4. *Oyster shell:* Throughout a major portion of the world, the oyster reef is one of the most significant features of estuaries, usually being found near the mouth of the estuary in a zone of moderate wave action, salt content, and turbidity. It is often a major factor in modifying estuarine current systems and sedimentation, and may occur as an elongated island or peninsula oriented across the main current, or may develop parallel to the direction of the current.

Group II—Hydrographic

A. *Circulation:* Circulation patterns are the result of the combined influences of freshwater flow, tidal action, wind and oceanic forces, and serve many functions: nutrient transport, plankton dispersal, ecosystem flushing, salinity control, water mixing, and more.

1. *Stratified:* This is typical of estuaries with a strong freshwater influx and is commonly found in bays formed from "drowned" river valleys, fjords, and other

deep basins. There is a net movement of freshwater outward at the top layer and saltwater at the bottom layer, resulting in a net outward transport of surface organisms and net inward transport of bottom organisms.

2. *Non-stratified:* Estuaries of this type are found where water movement is sluggish and flushing rate is low, although there may be sufficient circulation to provide the basis for a high carrying capacity. This is common to shallow embayments and bays lacking a good supply of freshwater from land drainage.

3. *Lagoonal:* An estuary of this type is characterized by low rates of water movement resulting from a lack of significant freshwater influx and a lack of strong tidal exchange because of the typically narrow inlet connecting the lagoon to the sea. Circulation, whose major driving force is wind, is the major limiting factor in biological productivity within lagoons.

B. *Tides:* This is the most important ecological factor in an estuary, as it affects water exchange and its vertical range determines the extent of tidal flats which may be exposed and submerged with each tidal cycle. Tidal action against the volume of river water discharged into an estuary results in a complex system whose properties vary according to estuary structure as well as the magnitude of river flow and tidal range. Tides are usually described in terms of their cycle and their relative heights. In the United States, tide height is reckoned on the basis of average low tide, which is referred to as datum. The tides, although complex, falls into three main categories:

1. *Diurnal:* This refers to a daily change in water level that can be observed along the shoreline. There is one high tide and one low tide per day.

2. *Semidiurnal:* This refers to a twice daily rise and fall in water that can be observed along the shoreline.

3. *Wind/Storm Tides:* This refers to fluctuations in water elevation to wind and storm events, where influence of lunar tides is less.

C. *Freshwater:* According to nearly all the definitions advanced, it is inherent that all estuaries need freshwater, which is drained from the land and measurably dilutes seawater to create a brackish condition. Freshwater enters an estuary as runoff from the land either from a surface and/or subsurface source.

1. *Surface water:* This is water flowing over the ground in the form of streams. Local variation in runoff is dependent upon the nature of the soil (porosity and solubility), degree of surface slope, vegetational type and development, local climatic conditions, and volume and intensity of precipitation.

2. *Subsurface water:* This refers to the precipitation that has been absorbed by the soil and stored below the surface. The distribution of subsurface water depends on local climate, topography, and the porosity and permeability of the underlying soils and rocks. There are two main subtypes of surface water:

a. *Vadose water:* This is water in the soil above the water table. Its volume with respect to the soil, is subject to considerable fluctuation.

b. *Groundwater:* This is water contained in the rocks below the water table, is usually of more uniform volume than vadose water, and generally follows the topographic relief of the land, being high below hills and sloping into valleys.

Group III—Chemical

A. *Salinity:* This reflects a complex mixture of salts, the most abundant being sodium chloride, and is a very critical factor in the distribution and maintenance of many estuarine organisms. Based on salinity, there are two basic estuarine types and eight different salinity zones (expressed in parts per thousand—ppt).

1. *Positive estuary:* This is an estuary in which the freshwater influx is sufficient to maintain mixing, resulting in a pattern of increasing salinity toward the estuary mouth. It is characterized by low oxygen concentration in the deeper waters and considerable organic content in bottom sediments.

2. *Negative estuary:* This is found in particularly arid regions, where estuary evaporation may exceed freshwater inflow, resulting in increased salinity in the upper part of the basin, especially if the estuary mouth is restricted so that tidal flow is inhibited. These are typically very salty (hyperhaline), moderately oxygenated at depth, and possess bottom sediments that are poor in organic content.

3. *Salinity zones (expressed in ppt):*

a. Hyperhaline—greater than 40 ppt.

b. Euhaline—40 ppt to 30 ppt.

c. Mixohaline: 30 ppt to 0.5 ppt.

(1) Mixoeuhaline—greater than 30 ppt but less than the adjacent euhaline sea.

(2) Polyhaline—30 ppt to 18 ppt.

(3) Mesohaline—18 ppt to 5 ppt.

(4) Oligohaline—5 ppt to 0.5 ppt.

d. Limnetic: Less than 0.5 ppt.

B. pH Regime: This is indicative of the mineral richness of estuarine waters and fall into three main categories:

1. Acid: Waters with a pH of less than 5.5.

2. Circumneutral: A condition where the pH ranges from 5.5 to 7.4.

3. Alkaline: Waters with a pH greater than 7.4.

PART 922—NATIONAL MARINE SANCTUARY PROGRAM

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APPENDIX 1 TO PART 922—NATIONAL MARINE SANCTUARY PROGRAM SITE IDENTIFICATION AND SELECTION CRITERIA FOR MARINE AREAS WITH QUALITIES OF SPECIAL NATIONAL SIGNIFICANCE

AUTHORITY: Pub. L. 98-498 (16 U.S.C. 1431-1439).

SOURCE: 53 FR 43806, Oct. 28, 1988, unless otherwise noted.

Subpart A—General

§ 922.1 Mission, goals, and special policies.

(a) In accordance with the standards set forth in Title III of the Marine Protection, Research, and Sanctuaries Act of 1972 (Act), the mission of the National Marine Sanctuary Program (Program) is to identify, designate and manage areas of the marine environment of special national significance due to their conservation, recreational, ecological, historical, research, educational, or esthetic qualities.

(b) The goals of the Program are to carry out the mission to:

(1) Provide enhanced resource protection through comprehensive and coordinated conservation and management of National Marine Sanctuaries that complements existing regulatory authorities;

(2) Support, promote, and coordinate scientific research on, and monitoring of, the site-specific marine resources of the National Marine Sanctuaries;

(3) Enhance public awareness, understanding, appreciation and wise use of the marine environment; and

(4) Facilitate, to the extent compatible with the primary objective of resource protection, multiple uses of the National Marine Sanctuaries;

(c) To the extent consistent with the policies set forth in Title III of the Act, in carrying out the Program's mission and goals:

(1) Particular attention will be given to the establishment and management of marine areas as National Marine Sanctuaries for the protection of the area's natural resource and ecosystem values; particularly for ecologically or economically important or threatened species or species assemblages, and for offshore areas where there are no existing special area protection mechanisms;

(2) The size of National Marine Sanctuaries, while highly dependent on the nature of the sites' resources, will be no longer than necessary to ensure effective management;

(3) Management efforts will be coordinated to the extent practicable with other countries managing protected marine areas;

(4) Program regulations, policies, standards, guidelines, and procedures under the Act concerning the identification, evaluation, registration, and treatment of historical resources shall be consistent, to the extent practicable, with the declared national policy for the protection and preservation of these resources as stated in the National Historic Preservation Act of 1966 (NHPA), 16 U.S.C. 470 *et seq.*, the Archeological and Historical Preservation Act of 1974, 16 U.S.C. 469 *et seq.* and the Archeological Resources Protection Act of 1979 (ARPA), 16 U.S.C. 470aa *et seq.* The same degree of regulatory protection and preservation

planning policy extended to historical resources on land shall be extended, to the extent practicable, to historical resources in the marine environment within the boundaries of designated National Marine Sanctuaries. The management of historical resources under the authority of the Act shall be consistent, to the extent practicable, with the Federal archeological program by consulting the Uniform Regulations, ARPA (43 CFR Part 7), the Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation (48 FR 44716, Sept. 29, 1983) and other relevant Federal regulations.

§ 922.2 Definitions.

(a) "Act" means Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.*

(b) "Active Candidate" means a site selected by the Secretary from the Site Evaluation List for further consideration for possible designation as a National Marine Sanctuary.

(c) "Historical" means possessing historical, cultural, archeological, or paleontological significance, including sites, structures, districts, and objects significantly associated with or representative of earlier people, cultures, and human activities and events.

(d) "Marine environment" means those areas of coastal and ocean waters, the Great Lakes and their connecting waters, and submerged lands over which the United States exercises jurisdiction, consistent with international law.

(e) "National historic landmark" means a district, site, building, structure or object designated by the Secretary of the Interior under the National Historic Landmarks (NHL) Program (36 CFR Part 65).

(f) "National Marine Sanctuary" means an area of the marine environment, as defined above in subsection (d), of special national significance due to its resource or human-use values, which is designated to ensure its conservation and management.

(g) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, agency, department, or instrumentality of the Federal government, of any state or local unit of government, or of any foreign government.

(h) "Regional Fishery Management Council" means any fishery council established under section 302 of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*).

(i) "Secretary" means the Secretary of the United States Department of Commerce or his or her designee.

(j) "Site Evaluation List" (SEL) means a list of selected natural and historical resource sites selected by the Secretary as qualifying for further evaluation for possible designation as National Marine Sanctuaries.

(k) "State" means each of the several states, the District of Columbia, the Commonweath of Puerto Rico, the Commonweath of the Northern Mariana Islands, American Samoa, the United States Virgin Islands, Guam, and any other commonwealth, territory, or possession of the United States.

(l) "Subsistence use" means the customary and traditional use by rural residents of areas near or in the marine environment for direct personal or family consumption as food, shelter, fuel, clothing, tools or transportation; for the making and selling of handicraft articles; and for barter, if for food or nonedible items other than money, if the exchange is of a limited and noncommercial nature.

§ 922.10 Effect of national marine sanctuary designation.

The designation of a National Marine Sanctuary, and the regulations implementing it, are binding on any person subject to the jurisdiction of the United States. Designation does not constitute any claim to territorial jurisdiction on the part of the United States for designated sites beyond the U.S. territorial sea, and the regulations implementing the designation shall be applied in accordance with generally recognized principles of international law, and in accordance with treaties, conventions, and other agreements to which the United States is a party. No regulation shall apply to a person who is not a citizen, national, or resident alien of the United States, unless in accordance with—

(a) Generally recognized principles of international law;

(b) An agreement between the United States and the foreign state of which the person is a citizen; or

(c) An agreement between the United States and the flag state of the foreign vessel, if the person is a crewmember of the vessel.

§ 922.11 Access and valid rights.

Leases, permits, licenses, or rights of subsistence use or access either in existence on October 19, 1984 (the date of enactment of the Marine Sanctuaries Amendments of 1984 (Pub. L. No. 98-498)), with respect to any National Marine Sanctuary designated before that date, or in existence on the date of designation of any National Marine Sanctuary designated after October 19, 1984, shall not be terminated by the Secretary. The Secretary, may, however, regulate such leases, permits, licenses, or rights consistent with the purposes for which the Sanctuary was designated.

Subpart B—Site Evaluation List (SEL)

§ 922.20 General.

(a) The Site Evaluation List (SEL) was established in 1983 as a comprehensive list of marine sites with high natural resource values that are highly qualified for further evaluation for possible designation as National Marine Sanctuaries. Appendix 1 describes that list, how it was established and its purposes. In addition, Subpart F of Appendix 1 has been revised to establish identification and selection criteria for revising the list to include marine sites with historical qualities of special national significance.

(b) Only sites on the SEL may be considered for subsequent review as active candidates for designation.

(c) Placement of a site on the SEL, or selection of a site from the SEL as an active candidate for designation as provided for in § 922.30, shall not subject the site to any regulatory control under the Marine Protection, Research and Sanctuaries Act. Such controls may only be imposed after designation, as provided for in § 922.34.

§ 922.21 Periodic reevaluation, deletions, and additions.

(a) The Secretary shall reevaluate any site remaining on the SEL for five years (December 31, 1988, for the original sites on the SEL and a separate five-year review period, beginning with the date of their addition, for any sites added to the SEL).

(b) If, after a five-year reevaluation, the Secretary determines that a marine site on the SEL is no longer highly qualified in accordance with the Program's mission and goals and the site identification and selection criteria, the Secretary shall publish a notice in the FEDERAL REGISTER of an intent to delete the site from the SEL and provide a 45-day period for public comment.

(c) As sites are designated as National Marine Sanctuaries, or rejected from further consideration, they will be removed from the SEL. Rejected sites will not be replaced on the SEL.

(d) If, after a five-year reevaluation, the Secretary determines that the new sites should be considered for addition to the SEL, the Secretary shall publish a notice in the FEDERAL REGISTER at least 12 months prior to initiating a new site identification process. After a 90-day period is provided for public comment on the Secretary's determination, the Secretary shall reevaluate the prior SEL development process and publish a notice in the FEDERAL REGISTER requesting public comment on that process and any proposed modifications, if necessary.

(e) Except as provided in § 922.21(d) and § 922.22, the Secretary will consider recommendations of potential additional sites to the SEL only if such sites are important new discoveries or if substantial new information previously unavailable establishes the national significance of a known site. The Secretary may determine, after an opportunity for public review and comment, whether such sites meet the selection criteria and are highly qualified in accordance with the Program's mission and goals. Qualified sites will be added to the SEL for further evaluation as National Marine Sanctuaries, consistent with the procedures set forth in these regulations.

§ 922.22 Addition of sites with historical qualities of special national significance.

(a) The identification and selection criteria set forth in Appendix 1 shall be used to identify areas of the marine environment possessing historical qualities of special national significance. The Secretary shall establish a group of experts to be called the Marine Historical Resource Evaluation Team to recommend a list of marine sites with historical values of special national significance for inclusion in the SEL. The Marine and Estuarine Management Division of the National Oceanic and Atmospheric Administration shall direct and coordinate the activities of the Team.

(b) After analysis of the historical sites recommended by the Marine Historical Resource Evaluation Team, the Secretary shall publich a notice in the Federal Register of the historical sites proposed for placement on the SEL and shall afford the public at least 90 days in which to comment. On the basis of the identification and selection criteria in Appendix 1, and after full consideration of public comment, the Secretary shall select those sites which are qualified for placement on the SEL because of their historical qualities of special national significance, and shall publish a notice in the Federal Register of the selected sites. Written documentation shall be prepared describing the values qualifying each site for placement on the SEL.

Subpart C—Designation of National Marine Sanctuaries

§ 922.30 Selection of active candidates.

(a) The Secretary shall, from time to time, select a limited number of sites from the SEL for Active Candidate consideration based on a preliminary assessment of the designation standards set forth in § 922.33.

(b) Selection of a site as an Active Candidate shall begin the formal sanctuary designation-evaluation process. A notice of intent to prepare a draft environmental impact statement shall be published in the Federal Register and in newspapers in the area(s) of local concern. A brief written analysis describing the site shall be provided. The Secretary, at any time, may drop a site from consideration if the Secretary determines that the site does not meet the designated standards and criteria set forth in the Act.

§ 922.31 Development of designation materials.

(a) After selecting a site as an Active Candidate, the Secretary shall prepare a draft designation document, including terms of the proposed designation, a draft management plan to implement the proposed designation and any proposed regulations needed to implement the terms of the proposed designation. The draft designation document shall be prepared in consultation with the House Merchant Marine and Fisheries Committee and the Senate Commerce, Science, and Transportation Committee; the Secretaries of State, Defense, Transportation, and the Interior, the Administrator of the Environmental Protection Agency, and the heads of other interested Federal agencies; the responsible officials or relevant agency heads of the appropriate state or local government entities, including coastal zone management agencies, that will or are likely to be affected by the establishment of the area as a National Marine Sanctuary; the appropriate officials of any Regional Fishery Management Council established by section 302 of the Magnuson Act which may be affected by the proposed designation; and other interested persons.

(b) The terms of the proposed designation shall include the geographic area to be included within the sanctuary; the characteristics of the area that give it conservation, recreational, ecological, historical, research, educational, or esthetic values; and the types of activities that would be subject to regulation in order to protect those characteristics. Following designation, the terms of designation may be modified only by the same procedures through which the original designation was made. If proposed regulations are needed to implement the terms of the proposed designation, they shall be consistent with the terms of designation. Following designation, all amendments to these regulations shall be consistent with the terms of designation.

(c) The draft management plan generally shall include sections on: goals and objectives; management responsibilities; resource studies and research; enforcement, including surveillance activities; interpretive and educational programs; and proposed regulations (where applicable). Proposed regulations relating to activities under the jurisdiction of one or more other Federal agencies shall be developed in consultation with those agencies.

(d) A draft environmental impact statement (DEIS) shall be prepared on the designation document/management plan, including any proposed regulations. The DEIS shall also include the resource assessment report, discussed in paragraph (h) of this section; maps depicting the boundaries of the proposed area, and the existing and potential uses and resources of the area.

(e) The draft management plan and the DEIS shall be prepared as quickly as possible to allow for maximum public input. The time period between Active Candidate selection and proposing to designate the area as a National Marine Sanctuary normally will not exceed three (3) years unless the Secretary determines that additional time is needed for public input.

(f) The Secretary shall provide the appropriate Regional Fishery Management Council with the opportunity to prepare and recommend for consideration by the Secretary draft regulations for fishing within the proposed sanctuary if the proposed sanctuary includes waters within the U.S. Exclusive Economic Zone.

(1) The Council shall have one hundred and twenty (120) days from the date of the Secretary's request to prepare draft fishery regulations and submit them to the Secretary. In preparing these recommendations, the Council shall use as guidance the national standards of section 301(a) of the Magnuson Act (16 U.S.C. 1851) to the extent that they are consistent and compatible with the goals and objectives of the proposed sanctuary designation.

(2) Draft regulations recommended by the Council, or its determination that regulations are not necessary, may be accepted by the Secretary. When making a determination whether to accept the Council's recommendation, the Secretary shall consider whether the Council's action fulfills the purposes and policies of the Marine Protection, Research, and Sanctuaries Act and the goals and objectives of the proposed designation;

(3) The Secretary shall prepare proposed fishery regulations necessary to implement the proposed sanctuary designation if the Council:

(i) Declines to make a determination with respect to the need for regulations,

(ii) Makes a determination which is rejected by the Secretary, or

(iii) Fails to recommend draft proposed regulations within the period specified in paragraph (f)(1) of the section.

(4) All amendments to fishery regulations shall be drafted, approved, and issued in the same manner as the original regulations.

(g) Fishery activities not proposed for regulation under paragraph (f) of this section may be listed in the draft sanctuary designation document as potentially subject to regulation, without following the procedures specified in paragraph (f) of this section. If the Secretary subsequently determines that regulation of any such fishery activity is necessary, then the procedures specified in paragraph (f) shall be followed.

(h) As part of the DEIS, the Secretary shall develop a resource assessment report documenting present and potential uses of the area, including commercial and recreational fishing, research and education, minerals and energy development, subsistence uses, and other commercial or recreational uses. In consultation with the Secretary of the Interior, the Secretary shall draft a resource assessment section for the report concerning any commercial or recreational resource uses in the area that are subject to the primary jurisdiction of the Department of the Interior.

(i) After the DEIS is prepared, the Secretary shall publish a notice of proposed designation in the FEDERAL REGISTER. That notice shall include the text of the draft designation document, any proposed regulations determined necessary to implement the proposed designation, and a summary of the management plan. The FEDERAL REGISTER notice shall be published concurrently with the Environmental Protection Agency (EPA) Notice of Availability of the DEIS.

(1) Notice of the proposed designation shall be published in newspapers of general circulation or communicated to electronic media in the communities that may be affected by the proposal.

(2) No sooner than thirty (30) days after publication of the notice of proposed designation in the FEDERAL REGISTER, the Secretary shall hold at least one public hearing in the coastal area or areas most affected by the proposed designation for the purpose of receiving the views of any interested parties.

§ 922.32 Congressional prospectus.

(a) As required by section 304(a)(1)(C) of the Act, on the same day that the FEDERAL REGISTER notice in § 922.31(i) is issued, the Secretary shall submit to the House Committee on Merchant Marine and Fisheries and the Senate Commerce, Science, and Transportation Committee a prospectus containing:

(1) The terms of the proposed designation;

(2) The basis of the designation findings made under section 303(a) of the Act with respect to the area;

(3) An assessment of the factors required to be considered by section 303(b)(1) of the Act;

(4) Proposed mechanisms to coordinate existing regulatory and management authorities within the area;

(5) The DEIS and the draft management plan, including the proposed regulations, detailing the proposed goals and objectives, management responsibilities, resource studies, interpretive and educational programs, and enforcement, including surveillance activities for the area;

(6) An estimate of the annual cost of the proposed designation, including costs of personnel, equipment and facilities, enforcement, research, and public education;

(7) An evaluation of the advantages of cooperative state and Federal management if all or part of a proposed marine sanctuary is within the territorial limits of any state or is superjacent to the subsoil and seabed within the seaward boundary of a state, as that boundary is established under the Submerged Lands Act (43 U.S.C. 1301 *et seq.*); and

(8) Any proposed regulations that may be necessary and reasonable to implement the proposed designation.

(b) In accordance with the provisions of section 304 of the Act, the Secretary shall not publish a notice to designate an area proposed as a National Marine Sanctuary until after forty-five (45) days of a continuous session of Congress starting with the day the prospectus required by paragraph (a) of this section is submitted to Congress. If either the Committee on Merchant Marine and Fisheries of the House of Representatives or the Committee on Commerce, Science and Transportation of the Senate, within the forty-five day period, issue a report concerning the prospectus, this report shall be considered by the Secretary before publishing a notice to designate a national marine sanctuary.

§ 922.33 Designation determination and findings.

(a) In addition to preparation of the final environmental impact statement (FEIS), final regulations, and final management plan, the Secretary shall prepare a written Designation Determination and Findings to include:

(1) A determination that the designation will fulfill the purposes and policies of the Act; and

(2) Finding that:

(i) The area is of special national significance due to its resource or human-use values;

(ii) Existing state and Federal authorities are inadequate to ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education;

(iii) Designation of the area as a national marine sanctuary will ensure coordinated and comprehensive conservation and management of the area, including resource protection, scientific research, and public education; and

(iv) The area is of a size and nature that will permit comprehensive and coordinated conservation and management.

(b) In preparing the Designation Determination and Findings the Secretary must consider:

(1) The area's natural resource and ecological qualities, including its contribution to biological productivitiy, maintenance of ecosystem structure, maintenance of ecologically or commercially important or threatened species or species assemblages, and the biogeographic representation of the site;

(2) The area's historical, cultural, archeological, or paleontological significance;

(3) The present and potential uses of the area that depend on maintenance of the area's resources, including commercial and recreational fishing, subsistence uses, other commercial and recreational activities, and research and education;

(4) The present and potential activities that may adversely affect the factors identified in paragraph (b) considerations (1), (2) and (3) of this section;

(5) The existing State and Federal regulatory and management authorities applicable to the area and the adequacy of those authorities to fulfill the purposes and policies of the Act;

(6) The manageability of the area, including such factors as its size, its ability to be identified as a discrete ecological unit with definable boundaries, its accessibility, and its suitability for monitoring and enforcement activities;

(7) The public benefits to be derived from sanctuary status, with emphasis on the benefits of long-term protection of nationally significant resources, vital habitats, and resources which generate tourism;

(8) The negative impacts produced by management restrictions on income-generating activities such as living and nonliving resources development;

(9) The socioeconomic effects of sanctuary designation; and

(10) The fiscal capability to manage the area as a National Marine Sanctuary.

(c) In preparing the Designation Determination and Findings, the Secretary shall consider the views of interested persons, heads of interested Federal agencies, responsible officials of appropriate state and local government entities, and appropriate officials of any Regional Fishery Management Council(s) that may be affected by the designation submitted in response to the notice proposing the designation or submitted as part of a public hearing on the proposal; and any reports submitted by the House Committee on Merchant Marine and Fisheries or the Senate Committee on Commerce, Science, and Transportation in response to the sanctuary proposal prospectus.

§ 922.34 Designation.

(a) In designating an area as a National Marine Sanctuary, the Secretary shall publish a notice of the designation in the FEDERAL REGISTER; this notice shall include the text of the final implementing regulations and shall also advise the public of the availability of the final management plan and the final EIS.

(b) The designation and regulations shall become final and take effect after the close of a review period of forty-five (45) days of continuous session of Congress, computed in accordance with section 304(b)(4) of the Act, beginning on the date of publication of the Federal Register notice in paragraph (a) of this section unless:

(1) The designation or any of its terms is disapproved by enactment of a joint resolution of disapproval consistent with section 304(b)(3) of the Act; or

(2) In the case of a national marine sanctuary that is located partially or entirely within the seaward boundary of any state, the Governor(s) of the affected state(s) certifies to the Secretary that the designation or any of its terms is unacceptable, in which case the designation or the unacceptable term shall not take effect in the area

of the sanctuary lying within the seaward boundary of the state(s).

(c) If the Secretary determines that the actions in paragraph (b) of this section affect the sanctuary designation in a manner that sanctuary goals and objectives cannot be fulfilled, the Secretary may withdraw the entire designation. If the Secretary does not withdraw the designation, only those terms of the designation not disapproved under paragraph (b)(1) of this section or not certified under paragraph (b)(2) of this section shall take effect.

§ 922.35 Coordination with states.

(a) The Secretary shall consult and cooperate with affected states throughout the national marine sanctuary designation process. In particular the Secretary shall:

(1) Consult with the relevant state officials prior to selecting any site on the SEL as an Active Candidate pursuant to § 922.30, especially concerning the relationship of any site to state waters and the consistency of the proposed designation with a federally approved state coastal zone management program. For the purposes of a consistency review by states with a federally approved coastal zone management programs, designation of a national marine sanctuary is deemed to be a Federal activity, which, if directly affecting the state's coastal zone, must be undertaken in a manner consistent to the maximum extent practicable with the approved state coastal zone program as provided by section 307(c)(1) of the Coastal Zone Management Act of 1972, as amended, and implementing regulations at 15 CFR Part 930, Subpart C.

(2) Ensure that relevant state agencies are consulted prior to holding any public hearings pursuant to § 922.31(i)(2).

(3) Provide the Governor an opportunity to certify the designation or any of its terms as unacceptable as specified in § 922.34(b)(2).

Subpart D—Implementation After Designation

§ 922.40 General.

(a) The Secretary shall implement the management plan, and applicable regulations, including carrying out surveillance and enforcement activities, and conducting such research and education as are necessary and reasonable to carry out the purposes and policies of the Act.

(b) Consistent with the sanctuary management plan, the Secretary shall develop and implement a site-specific contingency and emergency-response plan designed to protect the sanctuary resources. The plan shall contain alert procedures and actions to be taken in the event of an emergency such as a shipwreck or an oil spill.

(c) Where essential to prevent immediate, serious and irreversible damage to sanctuary resources, activities including those not listed in the designation may be regulated within the limits of the Act on an emergency basis for an interim period not to exceed one hundred and twenty (120) days, during which time an appropriate amendment of the terms of the designation shall be sought by the Secretary.

(d) Every five years, or sooner, the Secretary shall evaluate the substantive progress toward implementing the management plan and the goals of a designated sanctuary, especially the effectiveness of site-specific management techniques.

§ 922.41 Enforcement procedures.

The consolidated civil procedure regulations, set forth at 15 CFR Part 904, shall apply to all enforcement matters under the Act.

APPENDIX 1 TO PART 922—NATIONAL MARINE SANCTUARY PROGRAM SITE IDENTIFICATION AND SELECTION CRITERIA FOR MARINE AREAS WITH QUALITIES OF SPECIAL NATIONAL SIGNIFICANCE

BACKGROUND

The Site Evaluation List (SEL) was established in 1983 (48 FR 35568, August 4, 1983). Only sites on the SEL may be considered by the Secretary for subsequent review as "Active Candidates" for designation.

The original SEL was based on the then existing Marine Research, Protection, and Sanctuaries Act, which provided that national marine sanctuaries could be designated for their conservation, recreational, ecological, or esthetic values. It consisted of twenty-nine (29) marine sites with high natural resource values, identified and recommended for inclusion on the SEL by regional resource evaluation teams in accordance with the National Marine Sanctuary Program's mission and goals and then existent site identification and selection criteria (48 FR 24296, May 31, 1983). The Marine Sanctuaries Amendments of 1984 (Pub. L. No. 98-498) amended the Act to add additional qualities—historical, research, or education—which must also be considered when selecting sanctuary sites.

Areas of nationally significant research and educational qualities were considered in establishing the original SEL. These qualities are inherent in sites possessing significant conservation, recreational, ecological, or esthetic value. Therefore, additional areas of significant research and educational values will not be reconsidered at this time, except as provided in § 922.21 of the regulations.

Sites possessing nationally significant historical resources were not specifically considered when establishing the original SEL. There are no historical sites on the SEL. The existing SEL now needs to be amended to add areas of the marine environment possessing historical qualities of special national significance. Thus, the existing site identification and selection criteria have been amended to incorporate more specific criteria to identify and select areas of the marine environment possessing historical qualities of special national significance.

SITE IDENTIFICATION AND SELECTION CRITERIA

The following criteria are grouped into four categories: (1) Natural resource values; (2) human use/historical resource values; (3) potential activity impacts; and (4) management concerns. The criteria under each category reflect concerns significant to the National Marine Sanctuary Program and are designed to ensure that sites recommended to NOAA for SEL consideration have high natural resource and human resource values.

In selecting sites for the SEL, NOAA also considers the extent information on the site is available, existing and potential activity impacts and management concerns (as presented in sections III and IV, below). NOAA's selection of sites for the SEL is only the first of several determinations before sanctuary designation or subsequent rejection of the site as not qualified for sanctuary status.

At the SEL stage, NOAA's prime focus is on the site's natural resource and human use/historical resource values. The presence of such high values is a requisite or "minimum" requirement for NOAA's further consideration since the Marine Protection, Research, and Sanctuaries Act emphasizes the protection and management of marine areas which are of special national significance based on the site's conservation, recreational, ecological, historical, research, educational or esthetic qualities. Other, more specific issues are factored into NOAA's decision whether to select a site as an Active Candidate (see Subpart C of the regulations).

To determine if an area possesses historical values of special national significance and otherwise meets the Sanctuary designation standards specified in Section 303 of the Act, certain definitions and criteria are included in this appendix (see II.F) for use in evaluating these potential sites for listing on the SEL in accordance with § 922.22 of the regulations.

I. Natural Resource Values

A. Subregional Representation

The area under consideration is representative of the biogeographic subregion in which it is located.

Examples: This criterion would apply to an area containing species assemblages which are especially characteristic of the Oregonian subregion of the British Columbian region. Another example would be an area containing species assemblages which are especially characteristic of the Floridian or American Atlantic Antillean subregion of the West Indian region.

B. Community Representation

The area under consideration is significant in relation to the ecological communities which are found within the specified habitat type or within the biogeographic region or subregion (*i.e.*, on a macroscale, communities as assemblages of species populations within a prescribed area or habitat).

Examples: (1) The wide spectrum of marine habitats in the Channel Islands National Marine Sanctuary in California created by accentuated bottom relief, varied bottom substrates, and graduation in water depth from island shorelines to deep coastal basins support a variety of ecological communities.

(2) Coral reef, grass bed, soft bottom, and open-bay habitat areas in the Key Largo National Marine Sanctuary support a variety of ecological communities associated with the east Florida reef tract.

C. Biological Productivity

The area under consideration is significant in relation to its level of primary and/or secondary production.

Examples: (1) East Breaks at the edge of the continental shelf off Corpus Christi, Texas, is characterized by intense local upwelling, high primary productivity, and exceptional fish production.

(2) In the Gray's Reef National Marine Sanctuary, much production may be imported; outcroppings of limestone rocks may serve to entrap, conserve, and circulate detritus and plankton which provides energy sources for reef invertebrates, which in turn support marine fisheries and sea turtles.

(3) In the Channel Islands National Marine Sanctuary, the cold waters of the California current flowing south meet the warm waters of the California Counter Current flowing north to create upwellings of cold nutrient-rich waters that enhance the biological productivity of the area.

NOTE: This example also meets Criterion I.F.

(4) In many cases, coral reefs are not only energetically self-sustaining (*i.e.*, they produce locally enough food to support the community), but they are also specifically organized to entrap, hoard, and recycle materials received from the surrounding waters (*i.e.*, products that are imported and conserved).

D. Biotic Character/Species Representation

The area under consideration is of special interest because it supports:

(1) Ecologically limited species;

(2) Ecologically important species; or

(3) Unique species associations or biological assemblages.

Examples: (1) This criterion would apply to marine habitat areas upon which ecologically limited species (*e.g.*, threatened, endangered, rare, depleted, endemic, or peripheral species) are dependent during all or part of their lives.

(2) This criterion would apply to marine areas containing species which contribute in a significant way to the maintenance of a specified ecosystem found in the region or subregion, such as the Channel Islands Marine Sanctuary, which supports one of the most varied assemblages of marine mammals and seabirds in the world.

(3) The waters of Point Lobos, California, support a unique assemblage of kelp, sea urchin abalone, and sea otters.

(4) Submarine canyons support unusual biological communities of soft corals, crustaceans, and fish, and are known as "pueblo villages."

(5) This criterion would also apply to wide sandy bottom areas which are characterized by low productivity, but unique species composition, such as certain areas off central Texas.

E. Species Maintenance

The area under consideration is important to life history activities, including special feeding, courtship, breeding, birthing/nursery, resting/wintering, and migration areas.

Examples: (1) The waters off Point Reyes and the Farallon Islands provide deep and shallow water feeding areas for a wide variety of marine organisms, including seabirds, marine mammals, and marine fisheries. The Farallon Islands support the largest seabird rookeries in the contiguous United States and are used, along with the mainland, by California sea lions, harbor seals, and elephant seals for hauling out and pupping purposes. Whales, including several endangered species, and porpoise pass through the sanctuary on annual migrations.

(2) The waters around certain Hawaiian Islands are important wintering, birthing/nursery, and perhaps courtship/breeding areas for endangered whales.

(3) Spiny lobster migration routes off Florida are important for the "off shelf" movement of this species.

(4) The mouth of the Mississippi River is an important brown shrimp over-wintering ground.

F. Ecosystem Structure/Habitat Features

The area under consideration is characterized by special chemical, physical, and/or geological habitat features.

Examples: (1) The Florida Middle Grounds on the Gulf of Mexico continental shelf represent an unusual geological formation—a drowned Pleistocene reef—which supports rich and diverse reef communities.

(2) Transition zones occur where two different marine systems converge—such as at coastal/marine system interfaces, shelf/slope interfaces, soft bottom/hard bottom ecotones, or cold water/warm water current convergence zone. These areas of mixing often have unique physical and ecological characteristics, high production, and species diversity/population densities which are often greater than in areas flanking them. For example, a transition zone is formed near Cape Hatteras where cold northern waters of the Labrador Current mix with warm water eddies of the Gulf Stream/Florida Current and as a result, northern and southern species mix and co-exist with species endemic to the area.

NOTE: This example also meets Criterion I.C.

(3) Easternmost coastal areas of Maine—with unique bay-heads and rocky coasts, varied substrates derived from glacial materials, extensive sub-fjord character, and numerous offshore islands—are matched by

few areas in the world in habitat types and species diversity.

II. Human Use/Historical Resource Values

A. Fishery Resources of Recreational Importance

The area under consideration contains fish and shellfish species, species groups (*e.g.*, snapper-grouper complex), or fishery habitats which are important to the recreational fishing industry/community and for which conservation and management are in the public interest.

B. Fishery Resources of Commercial Importance

The area under consideration contains fish and shellfish species, species groups (e.g., snapper-grouper complex), or fishery habitats which are important to the commercial fishing industry and for which conservation and management are in the public interest.

C. Ecological/Esthetic Resources of Importance for Recreational Activities Other Than Fishing

The area under consideration contains exceptional natural resources and features which, because of their importance to nature watching and other nonconsumptive recreational activities, enhance human appreciation, understanding, and enjoyment of nature.

Examples: (1) Rocky shorelines, shallow nearshore waters, and intertidal pools in the Channel Islands and Gulf of the Farallones National Marine Sanctuaries have rich and varied plant and animal life which attract many persons interested in photography and nature study.

(2) The prominent topography around the Channel Islands and Gulf of the Farallones National Marine Sanctuaries provides outstanding ocean vistas.

(3) The spectacular spur-and-groove coral reef formation in the Looe Key National Marine Sanctuary attracts SCUBA and snorkeling enthusiasts from all over the world.

(4) The waters off Maui, Hawaii, are popular for humpback whale watching.

D. Research Opportunity

The area under consideration provides exceptional opportunities for research in marine science and resource management.

Examples: (1) The Gray's Reef National Marine Sanctuary serves as a natural laboratory or control area for research in live bottom ecology.

(2) The Key Largo National Marine Sanctuary is amenable to onsite research activities for many reasons, including the diversity of resources available, the past history of scientific research and education in the area, the compatibility with similar research efforts in adjacent John Pennekamp State Park and Biscayne National Park, and the proximity of the site to user groups. In addition, the Carysfort Reef Lighthouse provides a unique research base from which to launch studies concerning the sanctuary environment.

(3) The Channel Islands National Marine Sanctuary offers a special opportunity to coordinate research with the Channel Islands National Park. Such coordination will contribute to a better scientific understanding of the marine environment and to more effective management by answering questions such as those related to development and use of marine resources.

E. Interpretive Opportunity

The area under consideration provides an excellent opportunity to interpret the meanings and relationships of special marine resources in order to enhance general understanding, appreciation, and wise use of the marine environment.

Examples: (1) Through a variety of interpretive media, including aquaria displays, narrated slide shows and glassbottom boat tours, a visitor to the Key Largo National Marine Sanctuary is exposed to a variety of marine and coastal ecosystems, including open ocean, fringing coral reefs, patch reefs, mangroves, open bay, and barrier islands.

(2) The Channel Islands National Marine Sanctuary provides an exceptional opportunity to interpret marine and insular ecosystem features through the use of various interpretive "hands on" techniques that go beyond traditional educational tools such as brochures and pamphlets.

F. Historical, Cultural, Archeological or Paleontological Significance

The area under consideration contains (or is likely to contain) historical resources of special national significance.

DEFINITIONS

The term "historical" as defined in § 922.2(c) means possessing historical, cultural, archeological or paleontological significance, including sites, structures, districts and objects significantly associated with or representative of earlier people, cultures, and human activities and events. The term is used in the broad sense to refer to both pre-historic and historic periods, to the anthropological concept of culture, and to the processes, events, places, and objects related to the human past. The phrase "special national significance" in the context of historical areas denotes those areas with historical values of unique national significance and which are illustrative of the nation's maritime heritage.

CRITERIA FOR IDENTIFICATION AND SELECTION

The site identification criteria to be used by the Marine Historical Resource Evaluation Team to make its recommendation to the Secretary and the criteria to be used by the Secretary for selection of recommended sites for inclusion on the SEL are the same.

To qualify for recommendation to the Secretary and for selection for listing on the SEL because of a site's historical values, a site must have special national significance within the meaning set forth below in paragraphs (1) and (2) and meet the programmatic requirements set forth in paragraph (3). In determining whether a site has special national significance, the site's contribution to the historical resources already represented in the National Marine Sanctuary Program, if any, shall also be considered.

(1) *Determination of Significance*—The National Historic Landmark (NHL) Program (36 CFR Part 65), administered by the Department of the Interior, focuses attention on properties of exceptional value to the nation as a whole. It is the Federal means of weighing the national significance of historical resources. Properties designated as NHLs that are not already listed on the National Register of Historic Places are automatically listed there. In addition to adding historical units to the National Park System, NHL designation is a prerequisite for determining the eligibility of historical resources for nomination to the World Heritage List.

Consistent with the Marine Research, Protection, and Sanctuaries Act directive that the management of special marine areas complement existing regulatory authorities to the extent practicable, the criteria for nomination as a NHL shall be used as the first step in evaluating the historical, cultural, archeological or paleontological significance of a marine resource (See Table 1). Sites of national significance demonstrated by their designation as NHLs, or considered in consultation with the Department of the Interior and other appropriate authorities as meeting the NHL criteria, shall be further evaluated for recommendation for selection and evaluation for addition on the SEL, in accordance with paragraphs (2) and (3), below. Sites within the jurisdiction of the United States which have international significance as determined by the criteria for nomination to the World Heritage List shall also be evaluated (See Table 2).

(2) *Determination of Representative Distribution*—In addition to having national significance, a site, in order to be recommended or selected, must complement or contribute to the desired range of historical resources of the National Marine Sanctuary Program. Consistent with the Program's mission and goals set forth in § 922.1 of the regulations, sites recommended or selected for historical qualities must be illustrative of the nation's maritime heritage and representative of the nation's most significant historical marine resources.

(3) *Additional Programmatic Requirements*—In addition to having special national significance to qualify for recommendation and selection for addition to the SEL, coordinated and comprehensive conservation and management of the site including: (a) resource protection; (b) scientific reseach and monitoring; and (c) public education must be necessary in order to derive maximum present and future public benefit from the site's resources. Designation of a site as a National Marine Sanctuary must also complement existing regulatory authorities and improve the protection and preservation of the site's resources.

ADDITIONAL FACTORS IN SITE IDENTIFICATION AND SELECTION

III. Potential Activity Impacts

Many marine areas are subject to human use, some of which bring adverse pressures to bear on the natural resources. Where applicable, initial identification of potential marine sanctuary areas includes a summary of existing and potential human activities in these areas as well as a preliminary assessment of environmental impacts. To the extent such information is available, NOAA's selection of sites for the SEL will consider impacts of human activities on the area's natural resource and human use values, as well as the impacts of site selection on human activities already taking place within the site.

IV. Management Concerns

A. Relationship to Other Programs

While some sanctuaries may be designed to protect resources not currently managed by other existing programs (*e.g.,* the *U.S.S. MONITOR* on the continental shelf off North Carolina), most recommendations involved cooperation with some other Federal, State, local agency or organization. The ability of existing regulatory mechanisms to protect the values of the area and the contribution of the National Marine Sanctuary Program to that existing management effort may be an important factor in selecting sanctuary candidates. Depending on the location, the resource, and the existing system, national marine sanctuary designation could either complement the status quo by filling specific gaps or form a management umbrella over a fragmented system to help coordinate and strengthen diverse, but related efforts. At different sites, NOAA may work to complement other programs' efforts such as national estuarine research reserves, national parks, wildlife refuges, or state preserves, among others. There may be instances where NOAA's primary contribution to protection of special marine areas will be in the form of enhanced public awareness through interpretive and research programs.

B. Management of a Conservation Unit

Optimum size of a marine sanctuary is an issue to be considered in potential sanctuary sites. The size or extent of a marine sanctuary should be a cohesive conservation unit amenable to effective management given fiscal and staff constraints of the managing entities.

C. Accessibility

Since national marine sanctuaries are to be readily available for public use, when use is compatible with the sanctuary's goals and objectives, consideration should be given to factors which limit or enhance public access to a particular site.

D. Surveillance and Enforcement

Another issue to be considered when evaluating a potential sanctuary site is the degree to which the area lends itself to adequate enforcement and surveillance and the capabilities of responsible agents (*e.g.*, U.S. Coast Guard, state law enforcement divisions, or the like). This depends on the location, its size, and the types of resources involved. Consideration is also given to: (1) Degree of surveillance/enforcement presence needed in the area—light, medium, or heavy; (2) schedule—routine, prescribed, or case-by-case basis; and (3) logistics—vessels, aircraft, personnel, equipment, and budgetary requirements.

E. Economic Considerations

The designation of a national marine sanctuary may have economic effects at both local and national levels. Prior to the development of a management plan for a particular site which describes the uses and activities which may take place within a sanctuary, it is difficult to calculate fully the economic impact of sanctuary designation. It is also difficult to determine, at the SEL stage, the economic benefits of the sanctuary to society as a whole based on such considerations as public use, and research and interpretive values which will also be fully described in a management plan. Sanctuary designation may, in some cases, enhance economic value by ensuring long-term protection for commercially significant resources, such as commercial or recreational fish stocks, vital habitats, and resources which generate tourism. Conversely, a designated marine sanctuary may have negative economic impacts if management regulations unduly restrict commercial activities.

To the extent feasible, a decision to include a proposed site on the SEL will take into consideration the economic effects of sanctuary designation. As consideration of a particular site progresses through the designation process, more information will be developed and analyzed concerning the economic effects of sancturay designation.

TABLE 1: NATIONAL HISTORIC LANDMARKS PROGRAM SELECTION CRITERIA (36 CFR 65.4)

Specific Criteria of National Significance: The quality of national significance is ascribed to districts, sites, buildings, structures and objects that possess exceptional value or quality in illustrating or interpreting the heritage of the United States in history, architecture, archeology, engineering and culture and that possess a high degree of integrity of location, design, setting, materials, workmanship, feeling and association, and:

(1) That are associated with events that have made a significant contribution to, and are identified with, or that outstandingly represent, the broad national patterns of United States history and from which an understanding and appreciation of those patterns may be gained; or

(2) That are associated importantly with the lives of persons nationally significant in the history of the United States; or

(3) That represent some great idea or ideal of the American people; or

(4) That embody the distinguishing characteristics of an architectural type specimen exceptionally valuable for a study of a period, style or method of construction or that represent a significant, distinctive and exceptional entity whose components may lack individual distinction; or

(5) That are composed of integral parts of the environment not sufficiently significant by reason of historical association or artistic merit to warrant individual recognition but collectively compose an entity of exceptional historical or artistic significance, or outstandingly commemorate or illustrate a way of life or culture; or

(6) That have yielded or may be likely to yield information of major scientific importance by revealing new cultures, or by shedding light upon periods of occupation over large areas of the United States. Such sites are those which have yielded, or which may reasonably be expected to yield, data affecting theories, concepts and ideas to a major degree.

Ordinarily, cemeteries, birthplaces, graves of historical figures, properties owned by religious institutions or used for religious purposes, structures that have been moved from their original locations, reconstructed historic buildings and properties that have achieved significance within the past 50 years are not eligible for designation. Such properties, however, will qualify if they fall within the following categories:

(1) A religious property deriving its primary national significance from architectural or artistic distinction or historical importance; or

(2) A building or structure removed from its original location but which is nationally significant primarily for its architectural merit, or for association with persons or events of transcendent importance in the nation's history and the association consequential; or

(3) A site of a building or structure no longer standing but the person or even associated with it is of transcendent importance in the nation's history and the association consequential; or

(4) A birthplace, grave or burial if it is of a historical figure of transcendent national significance and no other appropriate site, building or structure directly associated with the productive life of that person exists; or

(5) A cemetery that derives its primary national significance from graves if persons of transcendent importance, or from an exceptionally distinctive design or from an exceptionally significant event; or

(6) A reconstructed building or ensemble of buildings of extraordinary national significance when accurately executed in a suitable environment and presented in a dignified manner as part of a restoration master plan, and when no other buildings or structures with the same association have survived; or

(7) A property primarily commemorative n intent if design, age, tradition, or symbolc value has invested it with its own national historical significance; or

(8) A property achieving national significance within the past 50 years if it is of exraordinary national importance.

Table 2: Criteria for Inclusion of Cultural Properties on the World Heritage List

(1) A monument, group of buildings or site which have been nominated for inclusion on he World Heritage List will be considered o be of outstanding universal value for the urposes of the World Heritage Convention when the World Heritage Committee finds hat it meets one or more of the following riteria and the test of authenticity. Each roperty nominated should therefore:

(i) Represent a unique artistic achievement, a masterpiece of the creative genius; r

(ii) Have exerted great influence, over a pan of time or within a cultural area of the world, on developments in architecture, monumental arts or townplanning and landscaping; or

(iii) Bear a unique or at least exceptional testimony to a civilization which has disappeared; or

(iv) Be an outstanding example of a type of structure which illustrates a significant stage in history; or

(v) Be an outstanding example of a traditional human settlement which is representative of a culture and which has become vulnerable under the impact of irreversible change; or

(vi) Be directly or tangibly associated with events or with ideas or beliefs of outstanding universal significance. (The Committee considered that this criterion should justify inclusion in the List only in exceptional circumstances or in conjunction with other criteria); and

In addition, the property must meet the test of authenticity in design, materials, workmanship, or setting.

(2) The following additional factors will be kept in mind by the Committee in deciding on the eligibility of a cultural property for inclusion on the List:

(i) The state of preservation of the property should be evaluated relatively, that is, it should be compared with that of other property of the same type dating from the same period, both inside and outside the country's borders; and

(ii) Nominations of immovable property which is likely to become movable will not be considered.

PART 923—COASTAL ZONE MANAGEMENT PROGRAM DEVELOPMENT AND APPROVAL REGULATIONS

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923.101 General.
923.102 Significant improvement defined.
923.103 Selection and approval of activities leading to significant improvements.
923.104 Establishing the "increasing proportion."
923.105 Failure to agree to pursue significant improvements.

AUTHORITY: Secs. 305, 306, 307 and 312, Coastal Zone Management Act of 1972, as amended, Pub. L. 92-583, 86 Stat. 1280, as amended by Pub. L. 94-370, 90 Stat. 1013 (16 U.S.C. 1451 et seq.), unless otherwise noted.

Source: 44 FR 18595, Mar. 28, 1979, unless otherwise noted.

Subpart A—General

§ 923.1 Purpose.

(a) The primary purpose of these regulations is to set forth the requirements for State coastal management program approval by the Assistant Administrator for Coastal Zone Management pursuant to the Coastal Zone Management Act of 1972, as amended (hereafter, the Act). Also, included in these regulations are the grant application procedures for program development and program implementation funds (pursuant to sections 305 and 306 of the Act, respectively); and conditions under which grants may be terminated.

(b) Sections 305, 306, and 307 of the Act set forth requirements which must be fulfilled as a condition of program approval. The specifics of these requirements are set forth below under the following headings: General Requirements; Uses Subject to Management; Special Management Areas; Boundaries; Authorities and Organization; Coordination, Public Involvement and National Interest; and, Miscellaneous. All relevant sections of the Act are dealt with under one of these groupings, but not necessarily in the order in which they appear in the Act.

(c) In summary, the requirements for program approval are that a State develop a management program that:

(1) Identifies and evaluates those coastal resources recognized in the Act as requiring management or protection by the State;

(2) Reexamines existing policies or develops new policies to manage these resources. These policies must be specific, comprehensive, and enforceable;

(3) Determines specific use and special geographic areas that are to be subject to the management program, based on the nature of identified coastal concerns;

(4) Identifies the inland and seaward areas subject to the management program;

(5) Provides for the consideration of the national interest in the planning for and siting of facilities that meet more than local requirements; and

(6) Includes sufficient legal authorities and organizational arrangements to implement the program and to ensure conformance to it. In arriving at these elements of the management program, States are obliged to follow an open process which involves providing information to and considering the interests of the general public, special interest groups, local governments, and regional, State, interstate, and Federal agencies.

(d) These regulations revise, consolidate, and supersede the following sets of existing regulations and guidance related to management program development and approval:

(1) Interim—Final Program Development and Approval regulations published March 1, 1978 (15 CFR Part 923) published in the FEDERAL REGISTER on March 1, 1978, dealing with all sections 305 and 306 program development and approval requirements;

(2) Final Coastal Zone Management Program Development regulations (15 CFR Part 920) published in the FEDERAL REGISTER on April 29, 1977, dealing with section 305 program development, preliminary approval and grant applications;

(3) Proposed Coastal Zone Management Program Approval regulations amendments (15 CFR Part 923) published in the FEDERAL REGISTER on December 30, 1976, dealing with subsections 306(c)(2)(B), 306(g), and 312 of the Act having to do with a continuing state-local consultation mechanism, changes to approved management programs, and termination and withdrawal of funding of approved management programs;

(4) Final Coastal Zone Management Program Approval regulations amendment (15 CFR Part 923) published in the FEDERAL REGISTER on November 2, 1976, dealing with subsection 306(h) of the Act having to do with island segments;

(5) The "Threshold Papers," informal guidance papers issued by Office of Coastal Zone Management (OCZM) in December 1975, but never published in the FEDERAL REGISTER;

(6) Interim Coastal Zone Management Federal-State Consultation regulations (15 CFR Part 925) published in the FEDERAL REGISTER on February 2, 1975, dealing with subsections 307 (b) and (h) of the Act which deal with federal consultation, review and approval procedures, and mediation during program development and preliminary approval; and

(7) Final Coastal Zone Management Program Approval regulations (15 CFR Part 923) published in the FEDERAL REGISTER on January 9, 1975, dealing with section 306 program approval requirements.

(e) Each subpart of the regulations is organized as follows:

(1) An introductory section describing which subsections of the Act are addressed in the subpart;

(2) Relevant statutory citations;

(3) The requirements. Where comments are included among the requirements, they are clearly distinguished by label and type face from the requirements. Comments on individual requirements are included for the purpose of providing a clearer understanding of acceptable or recommended ways to meet the requirement; and

(4) General commentary applicable to all the requirements.

(f) While states must meet the requirements of these regulations, their presentation—either to the Assistant Administrator or to the public—need not be in the order or terminology used herein. (See § 923.71 for further discussion of the program submission format.)

§ 923.2 Definitions.

(a) The term "Act" means the Coastal Zone Management Act of 1972, as amended.

(b) The term "Secretary" means the Secretary of Commerce and his/her designee. With the exception of the mediation functions discussed in § 923.54, all functions of the Act have been vested in the Assistant Administrator for Coastal Zone Management based on duly executed delegations of authority from the Secretary to the Administrator of the National Oceanic and Atmospheric Administration (NOAA) by Department of Commerce Organizational Order 25-5A, and from the Administrator to the Assistant Administrator for Coastal Zone Managment by NOAA Circular 78-14.

(c) The term "Assistant Administrator" means the Assistant Administrator for Costal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

(d)(1) The term "relevant Federal agencies" means those Federal agencies with programs, activities, projects, regulatory, financing, or other assistance responsibilities in the following fields which could impact or affect a State's coastal zone:

(i) Energy production or transmission,

(ii) Recreation of a more than local nature,

(iii) Transportation,

(iv) Production of food and fiber,

(v) Preservation of life and property,

(vi) National defense,

(vii) Historic, cultural, aesthetic, and conservation values,

(viii) Mineral resources and extraction, and

(ix) Pollution abatement and control.

(2) The following are defined as relevant Federal agencies:

Department of Agriculture;
Department of Commerce;
Department of Defense;
Department of Energy;
Department of Health, Education, and Welfare;
Department of Housing and Urban Development;
Department of the Interior;
Department of Transportation;
Environmental Protection Agency;
Federal Energy Regulatory Commission;
General Services Administration;
Nuclear Regulatory Commission.

(e) The term "Federal agencies principally affected" shall mean the same as "relevant Federal agencies." The Assistant Administrator may expand upon the term for purposes of reviewing the management program and environmental impact statement.

(f) The term "Coastal State" means a State of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. Pursuant to section 304(3) of the Act, the term also includes Puerto Rico, the Virgin Islands, Guam, and American Samoa. Pursuant to section 703 of the Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America, the term also includes the Northern Marianas.

(g) The term "management program" includes, but is not limited to, a comprehensive statement in words, maps, illustrations, or other media of communication, prepared and adopted by the State in accordance with the provisions of this title, setting forth objectives, policies, and standards to guide public and private uses of lands and waters in the coastal zone. The management program shall include an articulation of enforceable policies and citation of authorities providing this enforceability.

(h) The following terms, as used in these regulations, have the same definition as provided in section 304 of the Act:

(1) Coastal zone,
(2) Coastal waters,
(3) Estuary,
(4) Land use.

(i) The term "grant" means a financial assistance instrumment and refers to both grants and cooperative agreements.

§ 923.3 General requirements.

(a) Statutory Citations, Subsection 306(c)(1):

Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that: (1) the State had developed and adopted a management program for its coastal zone * * * which is adequate to carry out the purposes of this title and is consistent with the policy declared in section 303 of this title.

Section 302:
The Congress finds that—

(a) There is a national interest in the effective management, beneficial use, protection, and develpment of the coastal zone.

(b) The coastal zone is rich in a variety of natural, commercial, recreational, industrial, and aesthetic resoures of immediate and potential value to the present and future well-being of the Nation;

(c) The increasing and competing demands upon the lands and waters of our coastal zone occasioned by population growth and economic development, including requirements for industry, commerce, residential development, recreation, extraction of mineral resources and fossil fuels, transportation and navigation, waste disposal, and harvesting of fish, shellfish, and other living marine resources, have resulted in the loss of living marine resources, wildlife, nutrient-rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion;

(d) The coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man's alterations;

(e) Important ecological, cultural, hostoric, and aesthetic values in the coastal zone which are essential to the well-being of all citizens are being irretrievably damaged or lost;

(f) Special natural and scenic characteristics are being damaged by ill-planned development that threatens these values;

(g) In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate; and

(h) The key to more effective protection and use of the land and water resources of the coastal zone is to encourage the states to exercise their full authority over the lands and waters in the coastal zone by assisting the states, in cooperation with Federal and local governments and other vitally affected interests, in developing land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance.

(i) The national objective of attaining a greater degree of energy self-sufficiency would be advanced by providing Federal financial assistance to meet State and local needs resulting from new or expanded energy activity in or affecting the coastal zone.

Section 303:

The Congress finds and declares that it is the national policy (a) to preserve, protect, develop, and where possible, to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations; (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and aesthetic values as well as to needs for economic development, (c) for all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with State and local governments and regional agencies in effectuating the purposes of this title, and (d) to encourage the participation of the public, of Federal, state and local governments and of regional agencies in the development of coastal zone management programs. With respect to implementation of such management programs, it is the national policy to encourage cooperation among the various state and regional agencies including establishment of interstate and regional agreements, cooperative procedures, and joint action particularly regarding environmental problems.

(b) *Requirements.* The approvability of any state program will be determined by the Assistant Administrator in accordance with the following general requirements:

(1) The management program must provide for the management of those land and water uses having a direct and significant impact on coastal waters and must take steps to assure the appropriate protection of those significant resources and areas, such as wetlands, beaches and dunes, and barrier islands, that make the state's coastal zone a unique, vulnerable, or valuable area;

(2) The management program must contain three broad classes of policies, consistent with the findings of section 302 of the Act, that are related to resource protection, management of coastal development, and simplification of governmental processes.

(i) Within these three broad classes, states must include specific policies that provide the framework for the exercise of various management techniques and authorities governing coastal resources, uses, and areas.

(ii) As part of these three broad classes of policies, the management program must include policies that address uses of or impacts on wetlands and floodplains within the State's coastal zone. These particular policies shall minimize the destruction, loss or degradation of wetlands and preserve and enhance their natural values in accordance with the purposes of Presidential Executive Order 11990, pertaining to wetlands. These policies also shall reduce risks of flood loss, minimize the impact of floods on human safety, health and welfare, and preserve the natural, beneficial values served by floodplains, in accordance with the purposes of Presidential Executive Order 11988, pertaining to floodplains.

(3) The policies in the program must be appropriate to the nature and degree of management needed for uses, areas, and resources identified as subject to the program.

(4) The policies, standards, objectives, criteria, and procedures by which program decisions will be made must provide (i) a clear understanding of the content of the program, especially in identifying who will be affected by the program and how, and (ii) a clear sense of direction and predictability for decisionmakers who must take actions pursuant to or consistent with the management program.

Subpart B—Uses Subject to Management

§ 923.10 General.

This subpart deals with land and water uses which, because of their direct and significant impacts on coastal waters, are subject to the terms of the management program. Determination of these uses will assist in determining the appropriate coastal management boundary (see Subpart D). This subpart deals in full with the requirements of subsections 305(b)(2)—Uses Subject to Management, 305(b)(8)—Energy Facility Planning, and 306(e)(2)—Uses of Regional Benefit.

§ 923.11 Uses subject to management.

(a) Statutory Citation, Subsection 305(b)(2):

> The management program for each coastal state shall include * * * A definition of what shall constitute permissible land uses and water uses within the coastal zone which have a direct and significant impact on the coastal water.

(b) *Requirements.* (1) States must identify those land and water uses that will be subject to the terms of the management program. These uses shall be those with direct and significant impacts on coastal waters.

(2) The management program must explain how those uses identified in paragraph (b)(1) of this section will be managed. The management program must contain those enforceable policies, legal authorities, performance standards or other techniques or procedures that will govern whether and how uses will be allowed, conditioned, modified, encouraged or prohibited.

(c) *General comments.* (1) In identifying uses and their appropriate management, States should analyze the quality, location, distribution and demand for the natural and man-made resources of their coastal zone.

(2) States also should consider potential individual and cumulative impacts of uses on coastal waters including, but not limited to the following uses:

(i) Residential and commercial developments such as subdivisions, highrise apartments or hotels, trailer parks and second-home developments, and shopping centers;

(ii) Industrial developments, such as tank farms and refineries, power plants, manufacturing complexes, industrial parks, onshore and offshore port facilities, mineral and sand extraction operations, liquified natural gas (LNG) facilities, petrochemical plants, and Outer Continental Shelf (OCS) development. (OCS oil and gas lease sale activities do not involve development activities and are not subject to the Federal consistency requirements of section 307(c)(1));

(iii) Recreational facilities such as beaches, amusement parks, marinas and other boating facilities;

(iv) Public facilities and public works such as schools, hospitals, government buildings, dams and water treatment facilities; and

(v) Transportation facilities such as highways, railroads, airports, ports and harbors.

(3) States should utilize the following types of analyses:

(i) Capability and suitability of resources to support existing or projected uses;

(ii) Environmental impacts on coastal resources;

(iii) Compatability of various uses with adjacent uses or resources;

(iv) Evaluation of inland and other location alternatives;

(v) Water dependency of various uses and other social and economic considerations.

(4) Since management of uses must take into account the full range of considerations called for in sections 302, 303 and 307(f) of the Act, examination of the following representative factors is suggested:

(i) Air and water quality;

(ii) Historic, cultural and aesthetic resources where coastal development resources is likely to affect these resources;

(iii) Open space or recreational uses of the shoreline where increased access to the shorefront is a particularly important concern;

(iv) Floral and faunal communities where loss of living marine resources or threats to endangered or threatened coastal species are particularly important concerns.

[44 FR 18595, Mar. 28, 1979, as amended at 50 FR 35213, Aug. 30, 1985]

§ 923.12 Uses of regional benefit.

(a) Statutory Citation, Subsection 306(e)(2):

> Prior to granting approval, the Secretary shall also find that the program provides * * * for a method of assuring that local and water use regulations within the coastal zone do not unreasonably restrict or exclude land and water uses of regional benefit.

(b) *Requirement.* In order to meet the requirements of subsection 306(e)(2) of the Act, States must:

(1) Identify what constitute uses of regional benefit.

(2) Identify and utilize any one or a combination of methods, consistent with the control techniques employed by the State, to assure local land and water use regulations do not unreasonably restrict or exclude uses of regional benefit.

§ 923.13 Energy facility planning process.

(a) Statutory Citation Subsection 305(b)(8):

> The management program for each coastal state shall include * * * (8) A planning process for energy facilities likely to be located in, or which may significantly affect, the coastal zone, including, but not limited to, a process anticipating and managing the impacts from such facilities * * *

(b) *Requirements.* States must develop a planning process which is capable, at a minimum, of anticipating and managing the impacts from energy facilities in or affecting a State's coastal zone. This process must include the following elements:

(1) Identification of energy facilities which are likely to locate in, or which may significantly affect, a State's coastal zone;

(i) In determining energy facilities which may significantly affect the coastal zone, States must consider, at a minimum, those facilities listed in subsection 304(5) of the Act.

(ii) At a minimum, "significantly affect" shall be defined in terms of substantial or potentially substantial changes in coastal zone resources which could be affected by a proposed energy facility. These include changes in land, air, water, mineral, flora, fauna, noise, and objects of historic, cultural, archeological or aesthetic significance.

(2) Procedures for assessing the suitability of sites for such facilities. This assessment procedure shall be designed to evaluate, to the extent practicable, the costs and benefits of proposed and alternative sites in terms of State and national interests as well as local concerns.

(3) Articulation and identification of enforceable State policies, authorities and techniques for managing energy facilities and their impacts;

(i) States must identify any conditions that may be attached to State energy facility, planning and siting procedures;

(ii) States must list relevant constitutional provisions, laws, regulations, judicial decisions and other appropriate official documents or actions that are specifically related to planning for, anticipating and managing energy facilities or impacts, including licensing or permitting procedures.

(4) Identification of how interested and affected public and private parties will be involved in the planning process.

(i) States must identify the organization and structure and procedure means by which energy facility planning and siting decisions are carried out in the State.

(ii) States must address the respective roles of relevant State agencies and their relationship to the lead agency and to the management program's requirements as well as the respective roles and opportunity for participation by Federal agencies, local governments, other interested and affected public and private parties.

(iii) States must integrate into this planning process the procedures by which the national interest in the planning for and siting of energy facilities, identified pursuant to § 923.52(c) can continue to be considered after program approval.

(c) *General comments.* (1) States are encouraged to develop the elements required in paragraph (b) in consultation and cooperation with other State, local and Federal agencies. General consultation requirements for program development, of which this consultation should be considered a part, are discussed more fully in § 923.51. Depending on the approach taken to energy facilities management, this consultation and coordination should include, but need not be limited, to procedures for:

(i) Assessing need/demand projections;

(ii) Allocating these needs among coastal and inland locations;

(iii) Identifying potential coastal impacts; and

(iv) Determining site suitability of alternative locations for particular facilities.

(2) In developing this planning process, States should address several common problems having to do with weak policy and planning linkages and, relatedly, fragmented and overlapping jurisdictions.

(i) Often there is no comprehensive planning process. While one state agency may develop energy plans or policy regarding energy facilities, other state or local agencies may have the responsibility for issuing recessory siting and operating permits. Often these other agencies operate independently of and without regard to state energy or coastal management policies.

(ii) Relatedly, the responsibility for permitting of facilities is diffuse. Often several permits are required from several different agencies at different levels of government.

(iii) Additionally, there frequently are differing permitting processes for different types of energy facilities (e.g., oil and gas facilities as distinct from electric power plants). This may result in a lack of standardized procedures as well as inconsistent application of coastal management policies.

(3) In order to address these problems and to assure the full integration of coastal management considerations

with the energy facility planning process, States should consider the following:

(i) Establishment of the designated State coastal management agency as the lead agency in revewing and making decisions related to siting and conditions of development for energy facilities located in or significantly affecting the coastal zone;

(ii) In states where siting authority is vested in an agency other than the coastal management agency, establishment of a formal means to assure the input and consideration of the coastal management agency's views as part of the decision-making process;

(iii) Establishment of a procedure whereby the management program policies are incorporated into locational or developmental decisions (e.g., licenses, permits, zoning approvals).

Subpart C—Special Management Areas

§ 923.20 General.

(a) This subpart deals with areas that are of particular concern because of their coastal-related values or characteristics, or because they may face pressures which require detailed attention beyond the general planning and regulatory system which is part of the management program. As a result, these areas require special management attention within the terms of the State's overall coastal program. This special management may include regulatory or permit requirements applicable only to the area of particular concern. It also may include increased intergovernmental coordination, technical, assistance, enhanced public expenditures, or additional public services and maintenance to a designated area. This subpart deals with the following subsections of the Act: 305(b)(3)—Geographic Areas of Particular Concern; 305(b)(5)—Guidelines on Priorities of Uses; 305(b)(7)—Shorefront Access and Protection Planning; 305(b)(9)—Areas for Preservation and Restoration.

(b) The importance of designating areas of particular concern for management purposes and the number and type of areas that should be designated is directly related to the degree of comprehensive controls applied throughout a State's coastal zone. Where a State's general coastal management policies and authorities address state and national concerns comprehensively and are specific with respect to particular resources and uses, relatively less emphasis need be placed on designation of areas of particular concern. Where these policies are limited and non-specific, greater emphasis should be placed on areas of particular concern to assure effective management and an adequate degree of program specificity.

§ 923.21 Areas of particular concern.

(a) Statutory Citations Subsection 305(b)(3):

> The management program for each coastal state shall include * * *
>
> (a) an inventory and designation of areas of particular concern within the coastal zone.

Subsection 305(b)(5):

> The management program for each coastal state shall include * * *
>
> (b) broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority.

(b) *Requirements.* (1) Inventory and designate geographic areas that are of particular concern, on a generic (i.e., by type of area, such as all wetlands or port areas) or site-specific basis, or both;

(i) In developing criteria for inventorying and designating areas of particular concern. States shall consider whether the following represent areas of concern requiring special management:

(A) Areas of unique, scarce, fragile or vulnerable natural habitat; unique or fragile, physical, figuration (as, for example, Niagara Falls); historical significance, cultural value or scenic importance (including resources on or determined to be eligible for the National Register of Historic Places.);

(B) Areas of high natural productivity or essential habitat for living resources, including fish, wildlife, and endangered species and the various trophic levels in the food web critical to their well-being;

(C) Areas of substantial recreational value and/or opportunity;

(D) Areas where developments and facilities are dependent upon the utilization of, or access to, coastal waters;

(E) Areas of unique hydrologic, geologic or topographic significance for industrial or commercial development or for dredge spoil disposal;

(F) Areas or urban concentration where shoreline utilization and water uses are highly competitive;

(G) Areas where, if development were permitted, it might be subject to significant hazard due to storms, slides, floods, erosion, settlement, and salt water intrusion;

(H) Areas needed to protect, maintain or replenish coastal lands or resources including coastal flood plains, aquifers and their recharge areas, estuaries, sand dunes, coral and other reefs, beaches, offshore sand deposits and mangrove stands.

(ii) Where states will involve local governments, other state agencies, federal agencies and/or the public in the process of designating areas of particular concern, States must provide guidelines to those who will be involved in the designation process. These guidelines shall contain the purposes, criteria, and procedures for nominating areas of particular concern.

(2) Identify areas by location (if site specific) or category of coastal resources (if generic) in sufficient detail that affected landowners, governmental entities and the public can determine with reasonable certainty if a given area is or is not designated.

(3) Describe the nature of the concern and the basis on which designations are made in order to: (i) Indicate why areas or types of areas have been selected for special management attention, and (ii) provide a basis for appropriate management policies and use guidelines.

(4) Describe how the management program addresses and resolves the concerns for which areas are designated; and

(5) Provide guidelines regarding priorities of uses in these areas, including guidelines on uses of lowest priority.

§ 923.22 Areas for preservation or restoration.

(a) Statutory Citation, Subsection 306(c)(9):

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that * * * The management program makes provisions for procedures whereby specific areas may be designated for the purpose of preserving or restoring them for their conservation, recreational, ecological or aesthetic values.

(b) *Requirements.* (1) The criteria by which designations will be made must be included in the management program. Designations may be made for the purposes of preserving or restoring areas for their conservation, recreational, ecological, or aesthetic values.

(2) The procedures by which designations will be made must be included in the management program.

§ 923.23 Other areas of particular concern.

(a) States must meet the requirements of § 923.21(b) in order to receive program approval. Beyond this, States have the option of designating specific areas known to require additional or special management, but for which additional management techniques have not been developed or necessary authorities have not been established at the time of program approval. Where States exercise this option, they must meet the requirements of paragraph (b) of this section.

(b) *Requirements.* (1) The basis for designation of these additional special management areas must be clearly stated;

(2) A reasonable time frame and procedures must be established for developing and implementing appropriate management techniques. These procedures must provide for the development of those items required in § 923.21(b);

(3) An agency (or agencies) capable of formulating the necessary management policies and techniques must be identified.

(c) States must meet the requirements of § 923.22(b) for having procedures for designating areas for preservation or restoration. Beyond this, States have the option of including procedures for designating areas of particular concern for other than preservation or restoration purposes after program approval. Where States exercise this option, they must meet the requirements of paragraph (d) of this section.

(d) *Requirements.* (1) The criteria by which designations of additional areas of particular concern will be made must be included in the management program; and

(2) The procedures by which such designations will be made must be included in the management program.

§ 923.24 Shorefront access and protection planning.

(a) Statutory Citation, Subsection 305(b)(7):

> The management program for each coastal shall include * * * (a) a definition of the term "beach" and a planning process for the protection to, and access to, public beaches and other public coastal areas of environmental, recreational, historical, esthetic, ecological or cultural value.

(b) The basic purpose in focusing special planning attention on shorefront access and protection is to provide public beaches and other public coastal areas of environmental, recreational, historic, esthetic, ecological or cultural value with special management attention within the purview of the State's management program. This special management attention may be achieved by designating public shorefront areas requiring additional access or protection as areas of particular concern pursuant to § 923.21 or areas for preservation or restoration pursuant to § 923.22.

(c) *Requirements.* (1) The management program must contain a procedure for assessing public beaches and other public areas, including State owned lands, tidelands and bottom lands, which require access or protection, and a description of appropriate types of access and protection.

(2) There must be a definition of the term "beach" that is the broadest definition allowable under state law or constitutional provisions, and an identification of public areas meeting that definition.

(3) There must be an identification and description of enforceable policies, legal authorities, funding programs and other techniques that will be used to provide such shorefront access and protection that the State's planning process indicates is necessary.

§ 923.25 Shoreline erosion/mitigation planning.

(a) Statutory Citation, Section 305(b)(9):

> The management program for each coastal state shall include * * * A planning process for (A) assessing the effects of shoreline erosion (however caused), and (B) studying and evaluating ways to control, or lessen the impact of, such erosion, and to restore areas adversely affected by such erosion.

(b) The basic purpose in developing this planning process is to give special attention to erosion issues. This special management attention may be achieved by designating erosion areas as areas of particular concern pursuant to § 923.21 or as areas for preservation or restoration pursuant to § 923.22.

(c) *Requirements.* (1) The management program must include a method for assessing the effects of shoreline erosion and evaluating techniques for mitigating, controlling or restoring areas adversely affected by erosion.

(2) There must be an identification and description of enforceable policies, legal authorities, funding techniques and other techniques that will be used to manage the effects of erosion as the State's planning process indicates is necessary.

Subpart D—Boundaries

§ 923.30 General.

(a) This subpart deals in full with subsection 305(b)(1) of the Act—Boundaries of the Coastal Zone.

(b) There are four elements to a State's boundary: The inland boundary, the seaward boundary, areas excluded from the boundary, and, in most cases, interstate boundaries. Specific requirements with respect to procedures for determining and identifying these boundaries are discussed in the sections of this subpart that follow.

(c) Statutory Citations, Subsection 305(b)(1):

> The management program for each coastal state shall include * * * (1) An identification of the boundaries of the coastal zone subject to the management program.

Subsection 304(1):

> The term "coastal zone" means the coastal waters (including the lands therein and thereunder), and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other in proximity to the shorelines of the several coastal states, and includes islands, transitional and intertidal areas, salt marshes, wetlands, and beaches. The zone extends, in Great Lakes waters, to the international boundary between the United States and Canada and, in other areas seaward to the outer limit of the United States territorial sea. The zone extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters. Excluded from the coastal zone are lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents.

Subsection 304(2):

> The term "coastal waters" means (A) in the Great Lakes area, the waters within the territorial jurisdiction of the United States consisting of the Great Lakes, their connecting waters, harbors, roadsteads, estuary-type areas such as bays, shallows and marshes, and (B) in other areas, those waters adjacent to shorelines which contain a measurable quantity or percentage of seawater, including but not limited to, sounds, bays, lagoons, bayous, ponds and estuaries.

§ 923.31 Inland boundaries.

(a) *Requirements.* The inland boundary of a State's coastal management area must include:

(1) Those areas the management of which is necessary to control uses which have direct and significant impacts on coastal waters, pursuant to § 923.11 of these regulations;

(2) Those special management areas identified pursuant to § 923.21;

(3) Waters under saline influence—Waters containing a significant quantity of seawater, as defined by and uniformly applied by the State;

(4) Salt marshes and wetlands—Areas subject to regular inundation of tidal salt (or Great Lakes) waters which contain marsh flora typical of the region;

(5) Beaches—The area affected by wave action directly from the sea. Examples are sandy beaches and rocky areas usually to the vegetation line;

(6) Transitional and intertidal areas—Areas subject to coastal storm surge, and areas containing vegetation that is salt tolerant and survives because of conditions associated with proximity to coastal waters. Transitional and intertidal areas also include dunes and rocky shores to the point of upland vegetation;

(7) Islands—Bodies of land surrounded by water on all sides. Islands must be included in their entirety, except when uses of interior portions of islands do not cause direct and significant impacts.

(8) The inland boundary must be presented in a manner that is clear and exact enough to permit determination of whether property or an activity is located within the management area. States must be able to advise interested parties whether they are subject to the terms of the management program within, at a maximum, 30 days of receipt of an inquiry. An inland coastal zone boundary defined in terms of political jurisdiction (e.g., county, township or municipal lines) cultural features (e.g., highways, railroads), planning areas (e.g., regional agency jurisdictions, census enumeration districts), or a uniform setback line is acceptable so long as it includes the areas identified.

(b) Beyond those areas required by paragraph (a) of this section above States have the option of including the following within the coastal zone boundaries:

(1) Watersheds—A State may determine some uses within entire watersheds have direct and significant impact on coastal waters. In such cases it may be appropriate to define the coastal zone as including these watersheds.

(2) Areas of tidal influence that extend further inland than waters under saline influence; particularly in estuaries, deltas and rivers where uses inland could have direct and significant impacts on coastal waters.

(3) Indian lands not held in trust by the Federal Government.

(c) *General comments.* Urban areas: In many urban areas or where the shoreline has been modified extensively, natural system relationships between land and water may be extremely difficult, if not, impossible, to define in terms of direct and significant impacts. Two activities that States should consider as causing direct and significant impacts on coastal waters in urban areas are sewage discharges and urban runoff. In addition, States should consider dependency of uses on water access and visual relationships as factors appropriate for the determination of the inland boundary in highly urbanized areas.

§ 923.32 Seaward boundaries.

(a) *Requirements.* (1) For States adjoining the Great Lakes, the seaward boundary is the international boundary with Canada or the boundaries with adjacent States. For all other States participating in the program, the seaward boundary is the outer limit of the United States territorial sea.

(2) The requirement for defining the seaward boundary of a State's coastal zone can be met by a simple restatement of the limits defined in this section, unless there are water areas which require a more exact delineation because of site specific policies associated with these areas.

Where States have site specific policies for particular water areas, these shall be mapped, described or referenced so that their location can be determined reasonably easily by any party affected by the policies.

(b) *General comments.* The seaward limits, as defined in this section, are for purposes of this program only and represent the area within which the State's management program may be authorized and financed. These limits are irrespective of any other claims States may have by virtue of the Submerged Lands Act or any changes that may occur as a result of the Fisheries Conservation and Management Act of 1976.

§ 923.33 Excluded lands.

(a) *Requirement.* States must exclude from their coastal management zone those lands owned, leased, held in trust or whose use is otherwise by law subject solely to the discretion of the Federal Government, its officers or agents. To meet this requirement, States must describe, list or map lands or types of lands owned, leased, held in trust or otherwise used solely by Federal agencies.

(b) *Indian lands.* Tribal participation in coastal management efforts may be supported and encouraged through a State's program provided that:

(1) Tribal lands are not held in trust by the Federal Government or otherwise excluded from the coastal zone; and

(2) Such efforts are compatible with a State's coastal management policies and are in furtherance of the national policies of section 303 of the Act.

(c) *General comments.* (1) The exclusion of Federal lands does not remove Federal agencies from the obligation of complying with the consistency provisions of section 307 of the Act when Federal actions on these excluded lands have spillover impacts that significantly affect coastal zone areas, uses or resources within the purview of a State's management program. Therefore, States should consider mapping the following types of excluded Federal lands:

(i) Large-scale holdings (of 100 or more acres), especially those on which Federal activities may have spillover effects;

(ii) Lands near special management areas; and,

(iii) Lands that may be declared surplus or excess in the near future, especially those for which the State has reuse priorities or policies.

(2) In excluding Federal lands from a State's coastal zone for the purposes of this Act, a State does not impair any rights or authorities that it may have over Federal lands that exist separate from this program.

§ 923.34 Interstate boundaries.

Requirement. States must document that there has been consultation and coordination with adjoining coastal States regarding delineation of adjacent inland and lateral seaward boundaries.

Subpart E—Authorities and Organization

§ 923.40 General.

(a) The authorities and organizational structure on which a State will rely to administer its management program are the crucial underpinnings for enforcing the policies which guide the management of the uses and areas identified according to the previous subparts. There is a direct relationship between the adequacy of authorities and the adequacy of the overall program. The authorities need to be broad enough in both geographic scope and subject matter to ensure implementation of the State's enforceable policies. These enforceable policies must be sufficiently comprehensive and specific to regulate land and water uses, control development, and resolve conflicts among competing uses in order to assure wise use of the coastal zone. (Issues relating to the adequate scope of the program are dealt with in § 923.3.)

(b) The entity or entities which will exercise the program's authorities is a matter of State determination. They may be the State agency designated pursuant to section 306(c)(5) of the Act, other State agencies, regional or interstate bodies, and local governments. The major approval criterion is a determination that such entity or entities are required to exercise their authorities in conformance with the policies of the management program. Accordingly, the essential requirement is that the State demonstrate that there is a means of ensuring such compliance. This demonstration will be in the context of one or a combination of the three control techniques specified in section 306(e)(1) of the Act. The requirements related to section 306(e)(2) are described in §§ 923.42 through 923.44 of this subchapter.

(c) In determining the adequacy of the authorities and organization of a State's program, the Assistant Administrator will review and evaluate authorities and organizational arrangements in light of the requirements of this subpart and the finding of section 302(g) of the Act, which provides:

> In light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present State and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate.

(d) The authorities requirements of the Act dealt with in this subpart are those contained in subsections 305(b)(4)—Means of Control; 306(c)(7)—Authorities; 306(d)(1)—Control Development and Resolve Conflicts; 306(d)(2)—Powers of Acquisition; 306(e)(1)—Techniques of Control; and 307(f)—Air and Water Quality Control Requirements. The organizational requirements of the Act dealt with in this subpart are those contained in subsections 305(b)(6)—Organizational Structure; 306(c)(5)—Designated State Agency; and 306(c)(6)—Organization.

§ 923.41 Identification of authorities.

(a) Statutory Citations, Subsection 305(b)(4):

> The management program for each coastal state shall include * * * (4) An identification of the means by which the state proposes to exert control over the land uses and water uses referred to in paragraph (2), including a listing of relevant constitutional provisions, laws, regulations, and judicial decisions.

Subsection 306(c)(7):

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that * * * (7) The state has the authorities necessary to implement the program, including the authority required under subsection (d) of this section.

Subsection 306(d):

> Prior to granting approval of the management program, the Secretary shall find that the state, acting through its chosen agency or agencies, including local governments, areawide agencies designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, regional agencies, or interstate agencies, has authority for the management of the coastal zone, in accordance with the management program. Such authority shall include power:
>
> (1) To administer land and water use regulations, control development in order to ensure compliance with the management program, and to resolve conflicts among competing uses; and
>
> (2) To acquire fee simple and less than fee simple interests in lands, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program.

(b) *Requirements.* In order to meet the requirements of the preceding subsections of the Act, States must:

(1) Identify relevant constitutional provisions, statutes, regulations, case law and such other legal instruments (including executive orders and interagency agreements) that will be used to carry out the State's management program.

(2) This identification will include the authorities pursuant to sections 306(d) and 306(e) of the Act which require a State have the ability to:

(i) Administer land and water use regulations in conformance with the policies of the management program;

(ii) Control such development as is necessary to ensure compliance with the management program; and

(iii) Resolve conflicts among competing uses;

(iv) Acquire appropriate interest in lands, waters or other property as necessary to achieve management objectives. Where acquisition will be a necessary technique for accomplishing particular program policies and objectives, the management program must indicate for what purpose acquisition will be used (i.e., what policies or objectives will be accomplished); the type of acquisition (e.g., fee simple, purchase of easements, condemnation); and what agency (or agencies) of government have the authority for the specified type of acquisition.

§ 923.42 State establishment of criteria and standards for local implementation—Technique A.

(a) Statutory Citation, Subsection 306(e)(1)(A):

> Prior to granting approval, the Secretary hall also find that the program provides:
>
> (1) For anyone or a combination of the ollowing general techniques for control of and and water uses within the coastal zone;
>
> (A) State establishment of criteria and tandards for local implementation, subject o administrative review and enforcement of ompliance * * *

(b) Control technique subsection 06(e)(1)(A) of the Act allows for tate establishment of criteria and tandards for local implementation, ubject to administrative review and nforcement of compliance. There are principal requirements associated ith use of this control technique. hey are that:

(1) The State have in place adequate standards and criteria to guide local program development;

(2) During the period while local programs are being developed, the State has sufficient authority to assure compliance with the management program's enforceable policies;

(3) The State can ensure that local coastal programs will be developed pursuant to its standards and criteria;

(4) The State review and approve local coastal programs to assure their conformance to State standards and criteria; and

(5) The State has the ability to assure local compliance with its program once approved.

More detailed and specific requirements for each of these general items are contained in paragraph (c) of this section.

(c) *Requirements.* (1) The State must have developed and have in effect at the time of program approval enforceable policies that meet the requirements of § 923.3. These policies must serve as the standards and criteria for local program development or the State must have separate standards and criteria, related to these enforceable policies, that will guide local program development.

(2) During the period while local programs are being developed, a State must have sufficient authority to assure that land and water use decisions subject to the managment program will comply with the program's enforceable policies. The adequacy of these authorities wil be judged on the same basis as specified for direct State controls or case-by-case reviews.

(3) A State must be able to ensure that coastal programs will be developed pursuant to the State's standards and criteria, or failing this, that the management program can be implemented directly by the State. This requirement can be met if a State can exercise any one of the following techniques:

(i) Direct State enforcement of its standards and criteria in which case a State would need to meet the requirements of this section which address the direct State control technique;

(ii) Preparation of a local program by a State agency which the local government then would implement. To use this technique the State must have (A) statutory authority to prepare and adopt a program for a local government, and (B) a mechanism by which the State can cause the local government to enforce the State-created program. Where the mechanism to assure local enforcement will be judicial relief, the program must include the authority under which judicial relief can be sought;

(iii) State preparation and enforcement of a program on behalf of a local government. Here the State must have the authority to (A) prepare and adopt a plan, regulations, and ordinances for the local government and (B) enforce such plans, regulations and ordinances;

(iv) State review of local government actions on a case-by-case basis or on appeal, and prevention of actions inconsistent with the standards and criteria. Under this technique, when a local government fails to adopt an approvable program, the State must have the ability to review activities in the coastal zone subject to the management program and the power to prohibit, modify or condition those activities based on the policies, standards and criteria of the management program; or

(v) If a locality fails to adopt a management program, the State may utilize a procedure whereby the responsibility for preparing a program shifts to an intermediate level government, such as a county. If this intermediate level of government fails to produce a program, then the State must have the ability to take one of the actions described above. This alternative cannot be used where the intermediate level of government lacks the legal authority to adopt and implement regulations necessary to implement State policies, standards and criteria.

(4) A State must have a procedure whereby it reviews and certifies the local program's compliance with State standards and criteria. This procedure must include provisions for:

(i) Opportunity for the public and governmental entities (including Federal agencies) to participate in the development of local programs; and

(ii) Opportunity for the public and governmental entities (including Federal agencies) to make their views known (through public hearings or other means) to the State agency prior to approval of local programs; and

(iii) Review by the State of the adequacy of local programs consideration of facilities identified in a State's management program in which there is a national interest.

(A) A State must be able to assure implementation and enforcement of a local program once approved. To accomplish this a State must:

(*1*) Establish a monitoring system which defines what constitutes and detects patterns of non-compliance. In the case of uses of regional benefit and facilities in which there is a national interest, the monitoring system must be capable of detecting single instances of local actions affecting such uses or facilities in a manner contrary to the management program.

(*2*) Be capable of assuring compliance when a pattern of deviation is detected or when a facility involving identified national interests or a use of regional benefit is affected in a manner contrary to the program's policies. When State action is required because of failure by a local government to enforce its program, the State must be able to do one or a combination of the following:

(*i*) Directly enforce the entire local program;

(*ii*) Directly enforce that portion of the local program that is being enforced improperly. State intervention would be necessary only in those local government activities that are violating the policies, standards or criteria.

(*iii*) Seek judicial relief against local government for failure to properly enforce;

(*iv*) Review local government actions on a case-by-case basis or on appeal and have the power to prevent those actions inconsistent with the policies and standards.

(*v*) Provide a procedure whereby the responsibility for enforcing a program shifts to an intermediate level of government, assuming statutory authority exists to enable the immediate of government to assume this responsibility.

§ 923.43 Direct State land and water use planning and regulation—Technique B.

(a) Statutory Citation, Subsection 306(e)(1)(B):

> Prior to granting approval, the Secretary shall also find that the program provides:
>
> (1) For any one or a combination of the following general techniques for control of land and water uses within the coastal zone: * * * Direct state land and water use planning regulation.

(b) Control technique subsection 306(e)(1)(B) of the Act allows for direct state control of land and water uses subject to the management program on the basis of direct State authority. This authority can take the form of:

(1) Comprehensive legislation: A single piece of comprehensive legislation specific to coastal management and the requirements of this Act.

(2) Networking: The utilization of authorities which are compatible with and applied on the basis of coastal management policies developed pursuant to § 923.3

(c) *Requirements.* In order to apply the networking concept, State must:

(1) Demonstrate that, taken together, existing authorities can and will be used to implement the full range of policies and management techniques identified as necessary for coastal management purposes; and

(2) Bind each party which exercises statutory authority that is part of the management program to conformance with relevant enforceable policies and management techniques. Parties may be bound to conformance through an executive order, administrative directive or a memorandum of understanding provided that:

(i) The management program authorites provide grounds for taking action to ensure compliance of networked agencies with the program. It will be sufficient if any of the following can act to ensure compliance: The State agency designated pursuant to subsection 306(c)(5) of the Act, the State's Attorney General, another State agency, a local government, or a citizen.

(ii) The executive order, administrative directive or memorandum of understanding establishes conformance requirements of other State agency activities or authorities to management program policies.

(3) A gubernatorial executive order will be an acceptable instrument to meet the requirements of paragraph (c)(2) of this section in those States where networked State agency heads are directly responsible to the Governor.

(4) Where networked State agencies can enforce the management program policies at the time of section 306 approval without first having to revise their operating rules and regulations, then any proposed revisions to such rules and regulations which would enhance or facilitate implementation need not be accomplished prior to program approval. Where State agencies cannot enforce coastal policies without first revising their rules and regulations, then these revisions must be made prior to approval of the State's program by the Assistant Administrator.

§ 923.44 State review on a case-by-case basis of actions affecting land and water uses subject to the management program—Technique C.

(a) Statutory Citation; Subsection 306(e)(1)(C):

> Prior to granting approval, the Secretary shall find that the program provides:
>
> (1) For any one or a combination of the following general techniques for control of land and water uses within the coastal zone:
>
> State administrative review for consistency with the management program of all development plans, projects, or land and water use regulations, including exceptions and variances thereto, proposed by any state or local authority or private developer, with power to approve or disapprove after public notice and an opportunity for hearings.

(b) Under case-by-case review, States have the power to review individual development plans, projects or land and water use regulations (including variances and exceptions thereto) proposed by any State or local authority or private developer which have been identified in the management program as being subject to review for consistency with the management program.

This control technique requires the greatest degree of policy specificity because compliance with the program will not require any prior actions on the part of anyone affected by the program. Specificity also is needed to avoid challenges that decisions (made pursuant to the management program) are unfounded, arbitrary or capricious.

(c) *Requirements.* To use this control technique States must:

(1) Identify the plans, projects or regulations subject to review, based on their significance in terms of impacts on coastal resources, potential for incompatibility with the State's coastal management program, and having greater than local significance;

(2) Identify the State agency that will conduct this review;

(3) Include the criteria by which identified plans, projects and regulations will be approved or disapproved;

(4) Have the power to approve or disapprove identifed plans, projects or regulations that are inconsistent with the management program, or the power to seek court review thereof; and

(5) Provide public notice of reviews and the opportunity for public hearing prior to rendering a decision on each case-by-case review.

§ 923.45 Air and water pollution control requirements.

(a) Statutory Citation, Subsection 307(f);

> Notwithstanding any other provision of this title, nothing in this title shall in any way affect any requirement (1) established by the Federal Water Pollution Act as amended, or the Clean Air Act as amended, or (2) established by the Federal Government or any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this title and shall be the water pollution control and air pollution control requirements applicable to such program.

(b) *General Comments.* (1) Incorporation of the air and water quality requirements pursuant to the Clean Water Act, as amended (CWA) and Clean Air Act (CAA), as amended, should involve their consideration during program development, especially with respect to use determinations and designation of areas for special management. In addition, this incorporation will prove to be more meaningful if close coordination and working relationships between the State agency and the air and water quality agencies are developed and maintained throughout the program development process and after program approval.

(2) Following is a table of the most important Clean Air Act requirements. These requirements are categorized as either uniform, nationwide requirements or non-uniform requirements applicable to a specific State or local area. The first cateogry of requirements is established in the Clean Air Act or by the Environmental Protection Agency (EPA) pursuant to provisions of the CAA, and applies uniformly in all areas of the country. The second category of requirements is based on the nature of air quality problems that exist or are forecast in coastal areas, in locations where emission sources may affect air quality in coastal areas, and in other areas of a State. The majority of the second category of requirements will be included in the State Implementation Plans (SIPs) required by the Clean Air Act.

TABLE—CLEAN AIR ACT REQUIREMENTS

Uniform, nationwide requirements.	Nonuniform, nationwide requirements (SIPs).
National ambient air quality standards.	New source review.
Motor vehicle emission standards (except where States have been granted a waiver by EPA).	Emissions or air quality standards more stringent than Federal standards.
New source performance standards.	Prevention of significant deterioration.
National emissions standards for hazardous air pollutants.	Attainment and maintenance of national ambient air quality standards. Other attainment or maintenance measures such as transportation control measures.

(3) Water quality standards are established by EPA promulgation or approval of State standards, taking into consideration public water supplies, protection and propagation of fish, shellfish and wildlife, recreation, agriculture, industry and navigation, EPA itself develops standards on effluent limitations, new source preformance

standards, pre-treatment standards and toxic pollutant discharge standards.

(c) *Requirements.* (1) States must incorporate into their program, by reference or otherwise, requirements established pursuant to the Clean Water Act (CWA), as amended, and the Clean Air Act (CAA) as amended.

(2) If more stringent standards are developed; by a State or locality pursuant to the CWA or CAA, and where such standards can be enforced under State authorities, they must be incorporated, by reference or otherwise, into the State's management program.

§ 923.46 Organizational structure.

(a) Statutory Citation, Subsection 305(b)(6):

> The management program for each coastal state shall include * * * A description of the organizational structure proposed to implement such management program including the responsibilities and interrelationships of local, areawide, state, regional and interstate agencies in the management process.

Subsection 306(c)(6):

> Prior to grant approval of management program submitted by a coastal state, the Secretary shall find that * * * the State is organized to implement the management program required under paragraph (1) of this subsection.

(b) The main purpose of this requirement is to provide a clear understanding of the entities that have responsibility for administering various aspects of the management program and the interrelationship of these entities.

(c) *Requirements.* (1) States must describe the organizational structure that will be used to implement and administer the management program including a discussion of those State and other agencies, including local governments, that will have responsibility for administering, enforcing and/or monitoring those authorities or techniques required pursuant to the following subsections of the Act: 306(c) (B); 306(c)(7); 306(d) (1) and (2); 306(e) (1) and (2) and 307(f)

(2) States must describe the relationship of these administering agencies to the State agency designated pursuant to subsection 306(c)(5) of the Act.

§ 923.47 Designated State agency.

(a) Statutory Citation, Subsection 306(c)(5):

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that * * * The Governor of the state has designated a single agency to receive and administer the grants for implementing the management program required under paragraph (1) of this section.

(b) *Requirements.* (1) The Governor must designate a single State entity to receive and administer section 306 grants.

(2) This entity must have the fiscal and legal capability to accept and administer grant funds, to make contracts or other arrangements (such as passthrough grants) with participating agencies for the purpose of carrying out specific management tasks and to account for the expenditure of the implementation funds of any recipient of such monies, and

(3) This entity must have the administrative capability to monitor and evaluate the management of the State's coastal resources by the various agencies and/or local governments with specified responsibilities under the management program (irrespective of whether such entities receive section 306 funds); to make periodic reports to OCZM, the Governor, or the State legislature, as appropriate, regarding the performance of all agencies involved in the program. The entity must be capable of presenting evidence of adherence to the management program or justification for deviation as part of the review of State performance required by section 312 of the Act.

(c) *General comments.* (1) The 306 agency designated is designed to establish a single point of accountability for prudent use of administrative funds in the furtherance of the management and for monitoring of management activities. Designation does not imply that this single agency need be a "super agency" or the principal implementation vehicle. It is however, the focal point for proper administration and evaluation of the State's program and the entity to which OCZM will look when monitoring and reevaluating a State's program during program implementation.

(2) The requirements for the single designated agency contained herein need not be viewed as confining or otherwise limiting the role and responsibilities which may be assigned to this agency. It is up to the State to decide in what manner and to what extent the designated State agency will be involved in actual program implementation or enforcement. In determining the extent to which this agency should be involved in program implementation or enforcement, specific factors should be considered, such as the manner in which local and regional authorities are involved in program implementation, the administrative structure of the State, the authorities to be relied upon and the agencies administering such authorities. Because the designated State agency may be viewed as the best vehicle for increasing the unity and efficiency of a management program, the State may want to consider the following in arriving at a designation:

(i) Whether the designated State entity has a legislative mandate to coordinate other State or local programs, plans and/or policies within the coastal zone;

(ii) To what extent linkages already exist between the entity, other agencies, and local governments;

(iii) To what extent management or regulatory authorities affecting the coastal zone presently are administered by the agency; and

(iv) Whether the agency is equipped to handle monitoring, evaluation and enforcement responsibilities.

§ 923.48 Documentation.

(a) *Requirements.* Documentation in the form of a transmittal letter signed by the Governor, accompanying the management program submittal, is required to the effect that the Governor:

(1) Has reviewed and approved as State policy, the management program, and any changes thereto, submitted for the approval of the Assistant Administrator.

(2) Has designated a single State agency to receive and administer implementation grants;

(3) Attests to the fact that the State has the authorities necessary to implement the management program; and

(4) Attests to the fact that the State is organized to implement the management program.

Subpart F—Coordination, Public Involvement and National Interest

§ 923.50 General.

(a) Statutory Citation, Section 303:

> The Congress finds and declares that it is the national policy (a) to preserve, protect, develop, and, where possible, to restore or enhance the resources of the Nation's coastal zone for this and succeeding generations, (b) to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone giving full consideration to ecological, cultural, historic, and esthetic values as well as to needs for economic development, (c) for all Federal agencies engaged in programs affecting the coastal zone to cooperate and participate with state and local governments and regional agencies in effectuating the purpos of this title, and (d) to encourage the participation of the public, of Federal, state and local governments and of regional agencies in the development of coastal zone management programs. With respect to implementation of such management programs, i is the national policy to encourage cooperation among the various state and regiona agencies including establishment of inte state and regional agreements, cooperativ procedures, and joint, action particularly regarding environmental problems.

(b) Coordination with governmenta agencies having interests and respons bilities affecting the coastal zone, an involvement of interest groups as we as the general public is essential to th development and administration o State coastal management program The coordination requirements of thi subpart are intended to achieve proper balancing of diverse interest in the coastal zone. The policies of se tion 303 of the Act require that ther be a balancing of varying, sometim conflicting, interests, including:

(1) The preservation, protection, d velopment and, where possible, th restoration or enhancement of coast resources;

(2) The achievement of wise use of coastal land and water resources with full consideration for ecological, cultural, historic, and esthetic values and needs for economic development; and

(3) The involvement of the public, of Federal, State and local governments and of regional agencies in the development and implementation of coastal management programs.

(c) In order to be meaningful, coordination with and participation by various units and levels of government including regional commissions, interest groups, and the general public should begin early in the process of program development and should continue throughout on a timely basis to assure that such efforts will result in substantive inputs into a State's management program. State efforts should be devoted not only to obtaining information necessary for developing the management program but also to obtaining reactions and recommendations regarding the content of the management program and to responding to concerns by interested parties. The requirements for intergovernmental cooperation and public participation continue after program approval.

(d) This subpart deals with requirements for coordination with governmental entities, interest groups and the general public to assure that their interests are fully expressed and considered during the program development process and that procedures are created to insure continued consideration of their views during program implementation. In addition, this subpart deals with mediation procedures for serious disagreements between States and Federal agencies that occur during program development and implementation. This subpart addresses the requirements of the following subsections of the Act: 306(c)(1)—Opportunity for Full Participation; 306(c)(2)(A)—Plan Coordination; 306(c)(2)(B)—Continued State—Local Consultation; 306(c)(3)—Public Hearings; 306(c)(8)—Consideration of the National Interest in Facilities; 307(b)—Federal Consultation; and 307(h)—Mediation.

§ 923.51 Federal-State consultation.

(a) Statutory Citations, Subsection 306(c)(1):

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that: The state has developed and adopted a management program for its coastal zone * * * with the opportunity for full participation by relevant Federal agencies.

Subsection 307(b):

> The Secretary shall not approve the management program submitted by a State prusuant to section 306 unless the views of Federal agencies principally affected by such program have been adequately considered.

(b) The requirements of subsections 306(c)(1) and 307(b) of the Act and those of subsections 307 (c) and (d) establish reciprocal State-Federal relationships. In exchange for providing relevant Federal agencies with the opportunity for full participation during program development and for adequately considering the views of such agencies, States can effectuate the Federal consistency provisions of subsections 307 (c) and (d) of the Act once their programs are approved. (See 15 CFR Part 930 for a full discussion of the Federal consistency provisions of the Act.)

(c) In addition to the consideration of relevant Federal agency views required during program development, Federal agencies have the opportunity to provide further comment during the program review and approval process. (See Subpart H for details on this process.) Moreover, in the event of a serious disagreement between a relevant Federal agency and designated State agency during program development or during program implementation, the mediation provisions of subsection 307(h) of the Act are available. (See § 923.54 for details on mediation.)

(d) *Requirements.* In order to address that portion of subsection 306(c)(1) of the Act that deals with Federal agency participation, each State must:

(1) Contact each relevant Federal Agency listed in § 923.2(d) and such other Federal agencies as may be relevant, owing to a State's particular circumstances, early in the development of its management program. The pur-

pose of such contact is to develop mutual arrangements or understandings regarding that agency's participation during program development;

(2) Provide for Federal agency input on a timely basis as the program is developed. Such input shall be related both to information required to develop the management program and to evaluation of and recommendations concerning various elements of the management program;

(3) Solicit statements from the head of Federal agencies identified in Table 1 of § 923.52(c)(1) as to their interpretation of the national interest in the planning for and siting of facilities which are more than local in nature;

(4) Summarize the nature, frequency, and timing of contacts with relevant Federal agencies;

(5) Evaluate Federal comments received during the program development process and, where appropriate in the opinion of the State, accommodate the substance of pertinent comments in the management program. States must consider and evaluate relevant Federal agency views or comments about the following:

(i) Management of coastal resources for preservation, conservation, development, enhancement or restoration purposes;

(ii) Statements of the national interest in the planning for or siting of facilities which are more than local in nature;

(iii) Uses which are subject to the management program;

(iv) Areas which are of particular concern to the management program;

(v) Boundary determinations;

(vi) Shorefront access and protecting planning, energy facility planning and erosion planning processes; and

(vii) Federally developed or assisted plans that must be coordinated with the management program pursuant to subsection 306(c)(2)(A) of the Act.

(6) Indicate the nature of major comments by Federal agencies provided during program development (either by including copies of comments or by summarizing comments) and discuss any major differences or conflicts between the management program and Federal views that have not been resolved at the time of program submission.

§ 923.52 Consideration of the national interest in facilities.

(a) Statutory Citation, Subsection 306(c)(8):

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that * * * The management program provides for adequate consideration of the national interest involved in planning for, and in the siting of, facilities (including energy facilities in, or which significantly affect, such state's coastal zone) which are necessary to meet requirements which are other than local in nature. In the case of such energy facilities, the Secretary shall find that the state has given such considerations to any applicable interstate energy plan or program.

(b) The primary purpose of this requirement is to assure adequate consideration by States of the national interest involved in the planning for and siting of facilities (which are necessary to meet other than local requirements) during (1) the development of the State's management program, (2) the review and approval of the program by the Assistant Administrator, and (3) the implementation of the program as such facilities are proposed.

(c) *Requirements.* States must:

(1) Describe the national interest in the planning for and siting of facilities considered during program development.

(2) Indicate the sources relied upon for a description of the national interest in the planning for and siting of the facilities.

(3) Indicate how and where the consideration of the national interest is reflected in the substance of the management program. In the case of energy facilities in which there is a national interest, the program must indicate the consideration given any interstate energy plans or programs, developed pursuant to section 309 of the Act, which are applicable to or affect a State's coastal zone.

(4) Describe the process for continued consideration of the national interest in the planning for and siting of facilities during program implementation, including a clear and detailed description of the administrative proce-

dures and decisions points where such interest will be considered.

§ 923.53 Federal consistency procedures.

(a) *Requirements.* States shall include in their management program submission, as part of the body of the submission an appendix or an attachment, the procedures they will use to implement the Federal consistency requirements of subsections 307 (c) and (d) of the Act. At a minimum, the following shall be included:

(1) An indication of whether the state agency designated pursuant to subsection 306(c)(5) of the Act or a single other state agency will handle consistency review (see 15 CFR 930.18);

(2) A list of Federal license and permit activities that will be subject to review (see 15 CFR 930.53);

(3) For States anticipating coastal zone effects from Outer Continental Shelf (OCS) activities, the license and permit list also must include OCS plans which describe in detail Federal license and permit activities (see 15 CFR 930.74); and

(4) The public notice procedures to be used for certifications submitted for Federal License and permit activities and, where appropriate, for OCS plans (see 15 CFR 930.61 through 930.62 and 930.78).

(b) Beyond the minimum requirements contained in paragraph (a) of this section, States have the option of including the following in their management programs:

(1) A list of Federal activities, including development projects, which in the opinion of the State agency are likely to significantly affect the coastal zone and thereby will require a Federal agency consistency determination (see 15 CFR 930.35); and

(2) A description of the types of information and data necessary to assess the consistency of Federal license and permit activities and, where appropriate, those described in detail in OCS plans (see 15 CFR 930.56 and 930.75).

§ 923.54 Mediation.

(a) Statutory Citation, Subsection 307(h):

In the case of serious disagreement between any Federal agency and a coastal State:

(1) in the development or the initial implementation of a management program under section 305; or

(2) in the administration of a management program approved under section 306; the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

(b) The Act provides for the mediation of "serious disagreements" between any Federal agency and a coastal State during the development and implementation of a management program. In certain cases, mediation by the Secretary or his/her designee, with the assistance of the Executive Office of the President, may be an appropriate forum for conflict resolution. This section describes the conditions of and processes for mediation of serious disagreements that may arise during program development or implementation.

(c) State-Federal differences should be addressed initially by the parties involved. Whenever a serious disagreement cannot be resolved between the parties concerned, either party may request the informal assistance of the Assistant Administrator in resolving the disagreement. This request shall be in writing, stating the points of disagreement and the reason therefor. A copy of the request shall be sent to the other party to the disagreement.

(d) If a serious disagreement persists, the Secretary or other head of a relevant Federal agency, or the Governor or the head of the State agency designated by the Governor as administratively responsible for program development (if a state still is receiving section 305 program development or preliminary approval grants) or for program implementation (if a State is receiving section 306 program implementation grants) may notify the secretary in writing of the existence of a serious disagreement, and may request that the Secretary seek to mediate the serious disagreement. A copy of the written request must be sent to the ageny with which the requesting agency disagrees and to the Assistant Administrator.

(e) Within 15 days following receipt of a request for mediation, the disagreeing agency shall transmit a written response to the Secretary, the agency requesting mediation and to the Assistant Administrator indicating whether it wishes to participate in the mediation process. If the disagreeing agency declines the offer to enter into mediation efforts, the basis for refusal must be indicated. Upon receipt of a refusal to participate in mediation efforts, the Secretary shall seek to resolve the basis for refusal and persuade the disagreeing agency to reconsider its decision and enter into mediation efforts. The Secretary will not provide mediation assistance unless all parties to the serious disagreement agree to participate.

(f) In the case of a serious disagreement that occurs during program development, if all parties agree to mediation, the Secretary shall schedule a mediation conference to be attended by representatives from the Office of the Secretary, and the disagreeing Federal and State agencies. The Secretary shall provide the parties at least 10 days notice of the time and place set for the mediation conference. Notice also shall be placed in the FEDERAL REGISTER to allow other parties an opportunity to make known to the Secretary in writing their interest in the disagreement.

(g) If the mediation efforts do not resolve the disagreement, the Assistant Administrator shall determine whether inclusion in the management program of the State agency's position in the disgreement affects the Assistant Administrator's ability to approve the State's management program. The Assistant Administrator shall communicate his/her determination in writing, with the reason(s) therefor, the parties to the disagreement.

(h) In the case of a serious disagreement that occurs during program implementation, if the parties agree to the mediation process, the Secretary shall appoint a hearing officer who shall schedule a hearing in the local area concerned. The hearing officer shall give the parties at least 30 days notice of the time and place set for the hearing. Notice of the hearing also shall be placed in the FEDERAL REGISTER. At the time public notice is provided, the Federal and State agencies shall provide the public convenient access to public data and information related to the serious disagreement. Hearing shall be informal and shall be conducted by the hearing officer with the objective of securing, in a timely fashion, information related to the disagreement. The Federal and State agencies, as well as other interested parties, may offer information at the hearing subject to the hearing officer's supervision as to the extent and manner of presentation. Unduly long or repetitious oral presentations may be excluded at the discretion of the hearing officer. In the event of such exclusion, the party may provide the hearing officer with a written submission of the proposed oral presentation. Hearings will be recorded and the hearing officer shall provide transcripts and copies of written information offered at the hearing to the Federal and State agency parties. The public may inspect and copy the transcripts and written information provided to these agencies. Following the close of the hearing, the hearing officer shall transmit the hearing record to the Secretary. Upon receipt of the hearing record, the Secretary shall schedule a mediation conference to be attended by representatives from the Office of the Secretary, the disagreeing Federal and State agencies, and other interested parties whose participation is deemed necessary by the Secretary. The Secretary shall provide the parties at least 10 days notice of the time and place set for the mediation conference.

(i) Secretarial mediation efforts shall last only so long as the parties agree to participate. The Secretary shall confer with the Executive Office of the President, as necessary, during the mediation process.

(j) Mediation shall terminate: (1) At any time the parties agree to a resolution of the serious disagreement, (2) if one of the parties withdraws from mediation, (3) in the event the parties fail to reach a resolution of the serious disagreement within 15 days following

Secretarial mediation efforts, and the parties do not agree to extend mediation beyond that period, or (4) for other good cause.

(k) The availability of the mediation services provided in this section is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided herein.

§ 923.55 Full participation by State and local governments, interested parties, and the general public.

(a) Statutory Citation, Subsection 306(c)(1):

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that: the state has developed and adopted a management program for its coastal zone * * * with the opportunity of full participation by * * * state agencies, local governments, regional organizations, port authorities, and other interested parties, public and private * * *

(b) *Requirements.* In addition to consultation with Federal agencies, subsection 306(c)(1) of the Act requires that the opportunity for full participation in program development be provided State agencies, local governments, regional commissions and organizations, port authorities, and other interested public or private parties. To meet this requirement with respect to governmental entities (other than Federal) and other public or private parties States must:

(1) Develops and make available general information regarding the program design, its content and its status throughout program development;

(2) Provide a listing, as comprehensive as possible, of all governmental agencies, regional organizations, port authorities and public and private organizations likely to be affected by or to have a direct interest in the development and implementation of the management program;

(3) Indicate the nature of major comments received from interested or affected parties, identified in paragraph (b)(2) of this section, and the nature of the State's response to these comments; and

(4) Hold public meetings, workshops, etc., during the course of program development at accessible locations and convenient times, with reasonable notice and availability of materials.

§ 923.56 Plan coordination.

(a) Statutory Citation, Subsection 306(c)(2)(A):

> Prior to granting approval to a management program submitted by a coastal state, the Secretary shall find that * * *
>
> The State has: coordinated its program with local, areawide, and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the state's management program is submitted to the Secretary, which plans have been developed by a local government, and areawide agency designated pursuant to regulations established under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, a regional agency, or an interstate agency * * *

(b) *Requirements.* States must insure that the contents of their management programs have been coordinated with local, areawide and interstate plans applicable to areas within the coastal zone existing on January 1 of the year in which the State's management program is submitted to the Assistant Administrator for approval. To document this coordination, the management program must:

(1) Identify local governments, areawide agencies designated pursuant to regulations established under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, and regional or interstate agencies which have plans affecting the coastal zone in effect on January 1 of the year in which the management program is submitted;

(2) List or provide a summary of contacts with these entities for the purpose of coordinating the management program with plans adopted by a governmental entity as of January 1 of the year in which the management program is submitted. At a minimum, the following plans, affecting a State coastal zone, shall be reviewed: land use plans prepared pursuant to section 701 of the Housing and Urban Development Act of 1968, as amended; State

and areawide waste treatment facility or management plans prepared pursuant to sections 201 and 208 of the Clean Water Act, as amended; plans and designations made pursuant to the Flood Insurance Act of 1974; any applicable interstate energy plans or programs developed pursuant to section 309 of the Act; regional and interstate highway plans; plans developed by Regional Action Planning Commission; and fishery management plans developed pursuant to the Fisheries Conservation and Management Act.

(3) Identify conflicts with those plans of a regulatory nature that are unresolved at the time of program submission and the means that can be used to resolve these conflicts.

§ 923.57 Continuing consultation.

(a) Statutory Citation, Subsection 306(c)(B):

> Prior to granting approval to a management program submitted by a coastal state, the Secretary shall find that * * *
>
> The state has * * * established an effective mechanism for continuing consultation and coordination between the management agency designated pursuant to paragraph (5) of this section and with local governments, interstate agencies, regional agencies, and areawide agencies within the coastal zone to assure the full participation of such local governments and agencies in carrying out the purposes of this title; except that the Secretary shall not find any mechanism to be "effective" for purposes of this subparagraph unless it includes each of the following requirements:
>
> (i) Such management agency is required, before implementing any management program decision which would conflict with any local zoning ordinance, decision, or other action, to send a notice of such management program decision to any local government whose zoning authority is affected thereby.
>
> (ii) Any such notice shall provide that such local government may, within the 30-day period commencing on the date of receipt of such notice, submit to the management agency written comments on such management program decision, and any recommendation for alternatives thereto, if no action is taken during such period which would conflict or interfere with such management program decision unless such local government waives its rights to comment.
>
> (iii) Such management agency, if any such comments are submitted to it, within such 30-day period, by any local government:
>
> (I) is required to consider any such comments,
>
> (II) is authorized, in its discretion, to hold a public hearing on such comments, and
>
> (III) may not take any action within such 30-day period to implement the management program decision, whether or not modified on the basis of such comments.

(b) *Requirements.* (1) Establish a mechanism or mechanisms which will provide for continuing consultation and coordination after program approval between local governments, regional, areawide, multistate and other State agencies with activities in the coastal zone and the State agency designated pursuant to subsection 306(c)(5) of the Act;

(2) Establish a procedure whereby local governments with zoning authority are notified of State management program decisions which would conflict with any local zoning ordinance decision.

(i) "Management agency" refers to the State agency designated by the Governor pursuant to subsection 306(c)(5) of the Act and to any other State agency responsible for implementing a management program decision;

(ii) "Management program decision" refers to any major, discretionary policy decisions on the part of a management agency, such as the determination of permissible land and water uses, the designation of areas or particular concern or areas for preservation or restoration, or the decision to acquire property for public uses. Regulatory actions which are taken pursuant to these major decisions are not subject to the State-local consultation mechanisms;

(iii) A State management program decision shall be considered to be in conflict with a local zoning ordinance if the decision is contradictory to that ordinance. A State management program decision that consists of additional but not contradictory requirements shall not be considered to be in conflict with a local zoning ordinance, decision or other action;

(iv) "Local government" refers to those defined in section 304(10) of the Act which have some form of zoning authority.

(v) "Local zoning ordinance, decision r other action" refers to any local overnment land or water use action vhich regulates or restricts the con- truction, alteration of use of land, vater or structures thereon or there- nder. These actions include zoning rdinances, master plans and official naps. A local government has the ight to comment on a State manage- nent program decision when such de- ision conflicts with the above speci- ied actions;

(vi) Notification must be in writing nd must inform the local government f its right to submit comments to the State management agency in the event he proposed State management pro- ram decision conflicts with a local oning ordinance, decision or other ction. The effect of providing such otice is to stay State action to imple- nent its management decision for at east a 30-day period unless the local overnment waives its right to com- nent.

(vii) "Waiver" of the right of local overnment to comment (thereby per- nitting a State agency to proceed im- nediately with implementation of the nanagement program decision) shall esult:

(A) Following State agency receipt f a written statement from a local overnment indicating that it either:

(*1*) Waives its right to comment; or

(*2*) Concurs with the management rogram decision; or

(*3*) Intends to take action which con- licts or interferes with the manage- nent program decision; or

(B) Following a public statement by local government to the same effect s paragraph (b)(2)(vii)(A) of this sec- ion; or

(C) Following an action by a local overnment that conflicts or inter- eres with the management program lecison.

(viii) The management program hall include procedures to be followed y a management agency in consider- ng a local government's comments. These procedures shall include, at a ninimum, circumstances under which he agency will exercise its discretion o hold a public hearing. Where public earings will be held, the program nust set forth notice and other hearing procedures that will be followed. Following State agency consideration of local comments (when a discretionary public hearing is not held) or following public hearing, the management agency shall provide a written response to the affected local government, affected local government, within a reasonable period of time and prior to implementation of the management program decision, on the results of the agency's consideration of public comments.

§ 923.58 Public hearings.

(a) Statutory Citations, Subsection 306(c)(1):

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that:
>
> The state has developed and adopted a management program for its coastal zone * * * after notice * * *

Subsection 306(c)(3):

> Prior to granting approval of a management program submitted by a coastal state, the Secretary shall find that * * *
>
> The state has held public hearings in the development of the management program.

Section 311:

> All public hearings required under this title must be announced at least thirty days prior to the hearing date. At the time of the announcement, all agency materials pertinent to the hearings, including documents, studies, and other data, must be made available to the public for review and study. As similar materials are subsequently developed, they shall be made available to the public as they become available to the agency.

(b) *Requirements.* States shall:

(1) Hold a minimum of two public hearings during the course of program development, at least one of which will be on the total scope of the coastal management program. Hearings on the total management program do not have to be held on the actual document submitted to the Assistant Administrator for section 306 approval. However, such hearing(s) must cover the substance and content of the proposed management program in such a manner that the general public, and particularly affected parties, have a reasonable opportunity to understand the impacts of the management pro-

gram. If the hearing(s) are not on the management document per se, all requests for such document must be honored and comments on the document received prior to submission of the document to the Assistant Administrator must be considered;

(2) Provide a minimum of 30 days public notice of hearing dates and locations;

(3) Make available for public review, at the time of public notice, all agency materials pertinent to the hearings;

(4) Include a transcript or summary of the public hearing(s) with the State's program document or submit same within thirty (30) days following submittal of the program to the Assistant Administrator. At the same time this transcript or summary is submitted to the Assistant Administrator, it must be made available, upon request, to the public.

Subpart G—Miscellaneous

§ 923.60 General.

The purposes of this subpart are to provide guidance on meeting the requirements of subsection 306(h) of the Act dealing with segmented management programs and fulfilling the requirements for an environmental impact assessment which all management program submissions, whether for a State's total coastal zone or for a segment, must contain.

§ 923.61 Segmentation.

(a) Statutory Citation, Section 306(h):

> At the discretion of the state and with the approval of the Secretary, a management program may be developed and adopted in segments so that immediate attention may be devoted to those areas within the coastal zone which most urgently need management programs: Provided, that the state adequately provides for the ultimate coordination of the various segments of the management program into a single, unified program, and that the unified program will be completed as soon as reasonably practicable.

(b) This section of the Act reflects a recognition that it may be desirable for a State to develop and adopt its management program in segments rather than all at once because of a relatively long coastline, developmental pressures or public support in specific areas, or earlier regional management programs already developed and adopted. It is important to note, however, that the ultimate objective of segmentation is completion of a management program for the coastal zone of the entire State in a timely fashion.

(c) A segmented management program shall not be developed solely for the purpose of protecting or controlling a single coastal resource or use.

(d) Segmentation is at the State's option, but requires the approval of the Assistant Administrator.

(e) *Requirements.* If a State intends to adopt its management program in two or more segments, it shall advise the Assistant Administrator as early as practicable, stating the reasons for segmenting the program, and requesting the Assistant Administrator's approval. Upon receipt of the Assistant Administrator's approval, the segment submission shall include:

(1) A geographic area on both sides of the coastal land/water interface;

(2) A timetable and budget for the timely completion of the remaining segment(s); and

(3) The management boundary for the entire coastal zone throughout the state as part of the segment submission.

(4) Documentation of how the requirements of Subparts A through F are met for the segment.

§ 923.62 Environmental assessment.

(a) *Requirements.* All State management program submissions must contain an environmental assessment at the time of submission of the management program to OCZM for threshold review. In accordance with the Council on Environmental Quality regulations (FEDERAL REGISTER Vol. 43, No. 230, Nov. 29, 1978) § 1506.5(a) and (b), state environmental assessments shall contain the following information:

(1) A summary of the state's management program;

(2) A brief discussion of the need for the State's participation in the Federal program;

(3) A succinct description of the environment to be affected by program implementation;

(4) A description and discussion of the major alternatives which were considered by the State in developing the coastal management program;

(5) A discussion of the environmental impacts of implementing the program;

(6) A listing of agencies or persons consulted in determining the impacts of the management program.

(b) *General comments.* OCZM will independently evaluate the State's environmental assessment and use as much as possible in developing an EIS on the management program. An EIS will be produced for all state programs submitted for 306 approval. The timing and review procedures for the EIS are discussed in § 923.72.

Subpart H—Review/Approval Procedures

§ 923.70 General.

The purpose of this subpart is to describe the process of State program review and approval following submission of a State's management program to the Assistant Administrator. Because the review process involves preparation and dissemination of draft and final environmental impact statements and lengthy Federal agency review; States should at least anticipate that it normally will take 7 months between the time a State first submits a draft management program to OCZM for threshhold review and the point at which the Assistant Administrator makes a final decision on whether to approve the management program. Certain factors will contribute to lengthening or shortening this time table; these factors are discussed in the sections that follow. This subpart also provides guidance on a recommended format for the program document submitted to the Assistant Administrator for review and approval. In addition, this subpart provides criteria for providing preliminary approval of State coastal management programs pursuant to subsection 305(d) of the Act.

§ 923.71 Recommended format for program submission.

(a) This guidance is provided in response to requests from a number of States for a suggested format. States should note, however, that this format is not mandatory. As long as States address all the sections of the Act and associated requirements of these regulations, the presentation may be in such format as best suits their needs provided that such format has been discussed with and agreed to by OCZM.

(b) States should include an index with their program submission that indicates where in the management program document the information can be found which is necessary to make the findings required by the Act and associated requirements of these regulations. A chart is provided below of the findings required by the Act and associated requirements of these regulations. This chart should assist States in developing the index. If States use the chart below as an index, it is recommended that a third column entitled Page Number be added to expedite review.

TABLE 2—CHART—FINDINGS NECESSARY FOR SECTION 306 APPROVAL

Section of the Act	Associated section(s) of these regulations
Sec. 306(a) which includes the requirements of sec. 305:	
305(b)(1): Boundaries	923.31–923.34.
305(b)(2): Uses subject to management	923.11.
305(b)(3): Areas of particular concern	923.21–923.23.
305(b)(4): Means of control	923.41.
305(b)(5): Guidelines on priorities of uses	923.21.
305(b)(6): Organizational structure	923.46.
305(b)(7): Shorefront planning process	923.24.
305(b)(8): Energy facility planning process	923.13.
305(b)(9): Erosion planning process	923.25.
Sec. 306(c) which includes:	
306(c)(1): Notice: full participation; consistent with sec. 303	923.3, 923.51, 923.55, and 923.58.
306(c)(2)(A): Plan coordination	923.56.
306(c)(2)(B): Continuing consultation mechanisms	923.57.

TABLE 2—CHART—FINDINGS NECESSARY FOR SECTION 306 APPROVAL—Continued

Section of the Act	Associated section(s) of these regul
306(c)(3): Public hearings	923.58.
306(c)(4): Gubernatorial review and approval	923.48.
306(c)(5): Designation of recipient agency	923.47.
306(c)(6): Organization	923.46.
306(c)(7): Authorities	923.41.
306(c)(8): Adequate consideration of national interest	923.52.
306(c)(9): Areas for preservation/restoration	923.22.
Sec. 306(d) which includes:	
306(d)(1): Administer regulations, control development; resolve conflicts	923.41.
306(d)(2): Powers of acquisition, if necessary	923.41.
Sec. 306(e) which includes:	
306(e)(1): Technique of control	923.42-923.44.
306(e)(2): Uses of regional benefit	923.12.
Sec. 306(h): Segments	923.61.
Sec. 307 which includes:	
307(b): Adequate consideration of Federal agency views	923.51.
307(f): Incorporation of air and water quality requirements	923.45.
Applicable only to segmented management programs	

(c) OCZM recommends the following format for program submission: Summary; Framework of Program Development; Policies; 306 Requirements. OCZM also recommends the following items as appendices: Documentation of Government Consultation and Public Participation Efforts; Summaries of Required Public Hearings; Text of Relevant Legal Authorities; Environmental Assessment; and such other technical reports, maps, organizational charts or other materials a State feels would be useful in reviewing the management program. The elements of the main body of the management program are discussed in greater detail below:

(1) *Summary.* This section should serve as an executive summary of the program and should describe briefly the major elements of the State's management program. This section also should include a discussion of objectives the State will seek to attain through implementation of its management program. Specific milestones and timeframes for accomplishment of these objectives should be established where possible.

(2) *Framework of program development.* This section should address the major coastal issues and problems identified during the program development process, the nature of those issues and problems, and how the management program can help to resolve them. This section should include a discussion of the major coastal natural resources and human activiti which are important, unique and/o subject to intense pressures or co flicts. A brief discussion of the instit tional setting within which the pr gram was developed and some of th major considerations or alternative that led to particular management ap proaches is appropriate as part of thi section. In addition, there should be brief discussion of those issues an problems which the program may no address initially but which will b taken into consideration during pr gram implementation and/or futur program refinements.

(3) *Policies.* This section should co tain those policies that provide for comprehensive, enforceable and pr dictable management program. The policies should be tied to issues an problems (discussed in paragrap (c)(2) of this section) and to legal a thorities (discussed in paragraph (c)(4 of this section).

(4) *306 requirements.* In this sectio States should demonstrate that the r quirements of the Act and these regu lations have been met. The followin contents are suggested:

(i) *Boundaries.* The requirements of subsection 305(b)(1) of the Act and Subpart D of these regulations should be addressed. States may want to indicate here, or as part of the EIA, major boundary alternatives considered. General maps of the managemen boundaries and of excluded Federal lands, if provided, are recommended for inclusion in this section (or if more easily handled as a separate appendix, their location in the appendix should be indicated in this section).

(ii) *Uses subject to management.* The requirements of subsections 305(b)(2), 305(b)(8) and 306(e)(2) of the Act and related §§ 923.11 through 923.13 of these regulations should be addressed.

(iii) *Special management areas.* The requirements of subsections 305(b)(3), 305(b)(5), 305(b)(7), 305(b)(9), and 306(c)(9) and the associated requirements of Subpart C of these regulations should be addressed. States are encouraged to include generalized maps locating designated Areas of Particular Concern.

(iv) *Authorities and organization.* The requirements of subsections 305(b)(4), 305(b)(6), 306(c)(5), 306(c)(7), 306(d), 306(e)(1) and 307(f) of the Act and the associated requirements of Subpart E of these regulations should be addressed. This should include a discussion of the administrative and legal bases that will be used to implement and insure enforcement of and compliance with the policies of the management program. This section should include, as applicable, discussion of six types of legal authorities: State legislation, State agency regulations, gubernatorial executive orders, interagency agreements, significant judicial decisions and significant constitutional provisions. With respect to the organizational structure that will be used to implement the management program, this section should include a discussion of the roles and responsibilities during the program implementation of the State agency designated pursuant to subsection 306(c)(5) of the Act and of other State, local or regional agencies that will be involved in carrying out the management program. The relationship of the designated State agency to these other agencies also should be described.

(v) *Consultation, participation and national interests.* The requirements of subsections 306(c)(1) through (c)(3), 306(c)(8) and 307(b) of the Act and the related requirements of Subpart F of these regulations should be addressed. Included herein should be a summary of consultation efforts with relevant Federal and State agencies, local governments, regional, areawide and/or interstate entities. A summary of public information and participation during program development should be included. Also included herein should be discussions of national interest considerations; what procedures the State will use to implement the Federal consistency provisions of the Act; and what mechanisms will be used to insure continued governmental consultation and public participation after program approval. Detailed documentation regarding a number of the requirements addressed in this section can be reserved for appendices.

(vi) *Miscellaneous.* Normally, States will address the requirements of subsection 306(c)(4) and related § 923.48 in the gubernatorial transmittal that will accompany the program submission.

(d) For a segment submission, the same format should be used. All the requirements of the Act and these regulations apply, unless otherwise noted in § 923.61. Segment submissions also must address the requirements of subsection 306(h) of the Act and the associated requirements of § 923.61.

§ 923.72 Review/approval procedures.

(a) Upon submission by a State of its draft management program, OCZM is to determine if it adequately meets the requirements of the Act and these regulations. Assuming positive findings are made and major revisions to the State's draft management program are not required, OCZM will prepare a Draft Environmental Impact Statement (DEIS). The DEIS will incorporate the State's program document. This combined document, hereinafter referred to as the DEIS, will be distributed to principally affected Federal agencies, State, local and regional agencies, national interest groups and to interested individuals. Preparation of the DEIS, printing of the document, delivery to EPA, and publication in the FEDERAL REGISTER of notice of availability of the DEIS and notice of date and location of public hearing on the DEIS usually will take 45 days. Since States normally will be responsible for printing the DEIS, the time involved will vary depending on State printing capabilities.

(b) From the time of notice of availability in the FEDERAL REGISTER of the DEIS, each Federal agency, other person or entity normally has 45 days, pursuant to CEQ regulations to provide comments, if any, on the DEIS to the Assistant Administrator. During this time period, a public hearing will be held in one or more locations in the coastal State whose program is under review. At least fifteen (15) days notice, pursuant to CEQ regulations and the Administrative Procedures Act, will be provided, including announcement of availability of the DEIS. Following the public hearing(s), the comment period normally will remain open for fifteen days.

(c) Following the close of the DEIS comment period, the Assistant Administrator will review and evaluate comments received, in keeping with the requirement of subsection 307(b) of the Act to adequately consider the views of principally affected Federal agencies, and in keeping with the requirements of the National Environmental Policy Act (NEPA). Preparation of response to comments, revisions to the State's management program (if appropriate), submission of a final program, and preparation and printing of a Final Environmental Impact Statement (FEIS) normally will take a minimum of three months. Factors that will vary this time frame are: The nature of comments received on the DEIS, the nature and extent of revisions necessary to the management program, and State capabilities with respect to printing the FEIS (since States normally also will be responsible for printing the FEIS).

(d) Notice of the availability of the FEIS will be published in the FEDERAL REGISTER. The Assistant Administrator shall send a copy of such statement to each Federal agency or other person or entity which received a copy of the DEIS and to any additional persons who request a copy of the FEIS.

(e) The Assistant Administrator will review and evaluate any comments received during the thirty day review in keeping with the requirements of subsection 307(b) of the Act. The Assistant Administrator shall then approve or disapprove a State's management program. In the event of approval, the Assistant Administrator shall prepare a set of findings with respect to the requirements of the Act. These findings shall be available upon request. Notice of availability of these findings shall be published in the FEDERAL REGISTER. Principally affected Federal agencies will be sent a copy of the findings as a matter of course.

(f) In the event review of comments on the FEIS leads to a decision by the Assistant Administrator not to approve the management program, the Assistant Administrator shall so advise the State in writing, including the reason therefor. Notice of this decision also will be published in the FEDERAL REGISTER.

§ 923.73 Miscellaneous.

The timelines laid out in § 923.72 may be shortened if any of the following occur:

(a) Reduction of the time allotted to review environmental impact statements is proposed consistent with applicable procedures and guidelines of CEQ and their concurrence is requested. Reductions in review time normally are limited to emergency circumstances or conditions which would result in impaired program effectiveness; or

(b) A draft environmental impact statement has been issued in connection with preliminary approval pursuant to subsection 305(d) of the Act (see § 923.74 et seq.) and a supplementary or final impact statement is all that is necessary for full approval pursuant to subsection 306(a) of the Act; or

(c) In the case of segmented programs only, a determination is made that the proposed segment management program will not significantly affect the environment. In such cases a negative declaration will be prepared. The program submission still shall be sent to principally affected Federal agencies for their review and comment.

§ 923.74 Preliminary approval.

(a) Statutory Citation, Subsection 305(d):

The Secretary may make a grant annually to any coastal state * * * if a coastal state has a developed management program which (A) is in compliance with the rules and regulations promulgated to carry out subsection (b), but has not been approved by the Secretary under section 306; (B) specifically identified * * * any deficiency in such program which makes it ineligible for approval * * * and has established a reasonable time schedule during which it can remedy any such deficiency; (C) specified the purposes for which the grant will be used: (D) taken or is taking adequate steps to meet any requirement under sections 306 or 307 which involves any Federal official or agency; and (E) complied with any other requirement * * * necessary and appropriate to carry out the purposes of this subsection.

(b) The basic purpose of preliminary approval is to allow a State additional time to implement fully a coastal management program which, in its design and description, meets the requirements of section 306 of the Act. In granting preliminary approval, recognition is given to the need to describe, in a subsection 305(d) work program, those deficiencies precluding section 306 approval, the specifics for remedying those deficiencies, and a timetable within which this is to occur.

(c) Another objective is to provide funding to support initial implementation of selected elements of a State's coastal management program, provided that the overall design and description of the program meets the section 306 requirements. For selected elements to be initially implemented, necessary section 306 legal authorities and administrative capabilities must be in place;

(d) A third objective is to provide a State with additional time to resolve problems, uncovered during DEIS review of a program submitted for section 306 approval, when such problems would preclude full approval.

(e) The following are examples of situations under which States may apply for preliminary approval:

(1) A State may be able to describe the legislative authority it needs in order to meet the requirements under section 306 to have an approvable program, and to draft a bill carrying this out, but not be able to enact same within the time period provided pursuant to subsection 305(c). This could be because the legislature meets only every two years, or because the process is too complicated to accomplish in a matter of months.

(2) A State program may call on local units of government to prepare their own coastal plans in accordance with State guidelines. However, one or more years may be required for these units to carry out their work. Under this example, it should be noted that, depending on the nature of the State-local relationships and existing legal authorities, this activity also can be accomplished as part of a State's subsection 305(c) program development grant or as part of a section 306 program administrative grant.

(3) A State may need to reorganize within the Executive branch before a program can gain approval and funding under section 306.

(4) A State may be encountering problems resolving differences with one or a number of Federal agencies with respect to specific aspects of its coastal management program.

(f) Preliminary approval is not seen as a necessary continuum from section 305 to section 306 status. States may move directly from subsection 305(c) (program development) grants to section 306 (program implementation) grants. Progression from subsection 305(c) status to subsection 305(d) (preliminary approval) status is not automatic, nor is progression from preliminary approval status to section 306 status automatic. Application for preliminary approval requires consultation with the Assistant Administrator to insure that the State meets the eligibility conditions and approval criteria.

(g) Preliminary approval is meant to apply to a fully described coastal management program for a State's entire coastal zone. Accordingly, segments are not eligible for approval pursuant to this subsection but shall continue to be considered under provisions of section 306 of the Act and related § 923.61 of these regulations.

(h) In order to be eligible for consideration for preliminary approval, a State must be in one of the following situations:

(1) All subsection 305(c) program development grants must have been expended and the State can describe a

program that meets the basic approval criteria but there are still aspects of the program which must be instituted before section 306 approval can be given; or

(2) At any time during section 305 program development when a State has elements of its coastal management program to implement and meets the basic approval requirement (that the overall program as described would be approvable when fully implemented); or

(3) During the course of section 306 review, problems are uncovered that preclude section 306 approval but do not preclude preliminary approval.

§ 923.75 Requirements for preliminary approval.

(a) *Requirements.* For a State's coastal management program to receive preliminary approval pursuant to subsection 305(d) of the Act, the State must submit a document which:

(1) Describes the overall management program in sufficient detail that the Assistant Administrator can determine the program meets all section 305(b) requirements at the time submitted for preliminary approval and that it will meet all section 306 requirements at the time submitted for final approval;

(2) Identifies deficiencies that prohibit achievement of section 306 program approval, the means and a timetable for remedying these deficiencies.

(3) Specifies the purposes for which the subsection 305(d) grant is to be used.

(4) Demonstrate that adequate steps have been or are being taken to meet the requirements under section 306 or 307 of the Act, which involve Federal agencies. For purposes of this paragraph, the particular sections of 306 and 307 are:

(i) Subsection 306(a)(1)—identification of excluded Federal lands;

(ii) Subsection 306(c)(1)—opportunity for full participation by relevant Federal agencies. This shall include advising Federal agencies (especially at the regional level) of the State's intent to apply for preliminary approval;

(iii) Subsection 306(c)(8)—adequate consideration of the national interest involved in planning for, and in the siting of, facilities necessary to meet requirements which are other than local in nature;

(iv) Subsections 307 (c) and (d)—development of procedures for implementing the Federal consistency requirements upon full approval of the State's program; and

(v) Subsection 307(h)(1)—participation in mediation procedures, if appropriate.

(5) Demonstrates that the necessary legal authorities and organizational capability for implementation exists at the time of preliminary approval for those elements to be implemented under subsection 305(d).

(6) Includes an Environmental Assessment.

§ 923.76 Preliminary review/approval procedures.

(a) States interested in preliminary approval should consult with the Assistant Administrator well in advance of the point at which they would like to receive such approval. As a general rule, such consultation should begin six months before approval is desired. The purpose of this consultation is to determine:

(1) If the program will be sufficiently developed, designed and described to warrant consideration for preliminary approval at the time desired;

(2) If there are any elements of the State's management program eligible for implementation funding as part of preliminary approval;

(3) The content and detail of the Environmental Assessment (EA) which must accompany the State's preliminary approval submission; and

(4) If an EIS will be necessary prior to granting preliminary approval. If the Assistant Administrator indicates that the program appears to meet the subsection 305(d) approval criteria, and if a determination is that an EIS will not be necessary prior to preliminary approval, States should plan on submitting the subsection 305(d) program document, including an EA, two to three months prior to the desired date of approval. If the Assistant Administrator determines an EIS will be necessary prior to granting prelimi-

nary approval, States should plan on submitting the program document, including the EA shortly after this determination is made. The EIS procedures discussed in § 923.72 then will be followed. The subsection 305(d) program document should follow the general format recommended by OCZM in § 923.71. In addition, the information required in § 923.75(a) (2) and (3) with respect to describing deficiencies, timetable for remedying, and purposes for which the grant will be used must be included. The application for grant funds and the accompanying work program is separate document that may be submitted in conjunction with or subsequent to submission of the subsection 305(d) program document. The requirements for the grant application are contained in § 923.98.

(b) Upon submission by a State of a subsection 305(d) program document, the Assistant Administrator shall review the document for compliance with the approval criteria contained in § 923.75. If a State meets the approval criteria, the Assistant Administrator may award a subsection 305(d) grant and will issue a set of findings with respect to deficiencies and the timetable for their resolution.

(c) Copies of the subsection 305(d) program document and the Assistant Administrator's finding of deficiencies will be distributed to relevant Federal agencies.

(d) If a State applies for preliminary approval after formal section 306 program review has begun, preliminary approval will be issued at that point in the section 306 review process when the DEIS review reveals problems that preclude full program approval and implementation but do not preclude preliminary approval. States will be required to take into consideration those items raised by DEIS reviews as part of the subsection 305(d) work program.

Subpart I—Amendments to and Termination of Approved Management Programs

§ 923.80 General.

(a) This subpart establishes the criteria and procedures by which amendments to approved management programs may be made. This subpart also establishes the conditions and procedures by which administrative funding may be terminated for programmatic reasons.

(b) Statutory Citations, Subsection 306(g):

> Any coastal state may amend or modify the management program which it has submitted and which has been approved by the Secretary under this section, pursuant to the required procedures described in subsection (c) * * * [N]o grant shall be made under this section to any coastal state after the date of such amendment of modification, until the Secretary approves such amendment or modification.

Subsection 312(b):

> The Secretary shall have the authority to terminate any financial assistance extended under section 306 and to withdraw any unexpended portion of such assistance if (1) he determines that the state is failing to adhere to and is not justified in deviating from the program approved by the Secretary, and (2) the state has been given notice of the proposed termination and withdrawal and given an opportunity to present evidence of adherence or justification for altering its program.

(c) For purposes of this subpart, amendments are defined as substantial changes in, or substantial changes to enforceable policies or authorities related to:

(1) Boundaries;

(2) Uses subject to the management program;

(3) Criteria or procedures for designating or managing areas or particular concern or areas for preservation or restoration; and

(4) Consideration of the national interest involved in the planning for and in the siting of, facilities which are necessary to meet requirements which are other than local in nature.

§ 923.81 Requests for amendments.

(a) *Requirement.* Requests for amendments shall be submitted to the Assistant Administrator by the Governor of a coastal State with an approved management program or by the head of the State agency (designated pursuant to section 306(c)(5)) if the Governor has delegated this responsibility and such delegation is part of the approved management program.

(b) *Requirements.* Amendment requests shall contain the following:

(1) Description of the proposed change, including specific pages and text of the management program that will be changed if the amendment is approved by the Assistant Administrator;

(2) Explanation of why the change is necessary and appropriate, including a discussion of the following factors, as relevant: Changes in coastal zone needs, problems, issues, or priorities. This discussion also shall identify which findings, if any, made by the Assistant Administrator in approving the management program may need to be modified if the amendment is approved;

(3) Copy of public notice(s) announcing the public hearing(s) on the proposed amendments:

(i) At least one public hearing must be held on the proposed amendment, pursuant to section 306(c)(3) of the Act;

(ii) Pursuant to section 311 of the Act, notice of such public hearing(s) must be announced at least 30 days prior to the hearing date.

(iii) At the time of the announcement, relevant agency materials pertinent to the hearing must be made available to the public;

(4) Summary of the hearing(s) comments:

(i) Where OCZM is providing Federal agency review concurrent with the notice period for the State's public hearing, this summary of hearing(s) comments may be submitted to the Assistant Administrator within 60 days after the hearing;

(ii) Where hearing(s) summaries are submitted as a supplement to the amendment request (as in the case described in paragraph (b)(1) of this section), the Assistant Administrator will not take final action to approve or disapprove an amendment request until the hearing(s) summaries have been received and reviewed;

(5) Documentation of opportunities provided relevant Federal, State, regional and local agencies, port authorities and other interested public and private parties to participate in the development and approval at the State level of the proposed amendment.

(c) Requests for amendments should be sumitted to the Assistant Administrator whenever possible prior to final State action to implement a major program.

§ 923.82 Amendment review/approval procedures.

(a) Upon submission by a State of its amendment request, OCZM will review the request to determine preliminarily if:

(1) The management program, if changed according to the amendment request, still will constitute an approvable program.

(i) For amendments affecting management program boundaries, this will involve a determination that the program, if changed, will continue to include the following areas (as defined in § 923.31(a)) within the State's coastal zone:

(A) Areas the management of which is necessary to control uses with direct and significant impacts on coastal waters;

(B) Transitional and intertidal areas;

(C) Salt marshes and wetlands;

(D) Islands;

(E) Beaches; and

(F) Waters under tidal influence.

(ii) For amendments affecting uses subject to the management program, this will involve a determination that the program, if changed, will continue to:

(A) Identify which uses are subject to the management program (see § 923.10(b)(1));

(B) Assure that policies and authorities governing the management of these uses incorporate a sufficient range of considerations to address the findings and policies of sections 302 and 303 of the Act (see § 923.3(b)(1) and (2));

(C) Assure that policies and authorities related to use management are capable of effective implementation at the time of amendment approval (see § 923.10 (b)(2)); and

(D) Identify uses considered by the State to be of regional benefit and a method (or methods) of assuring local regulations do not unreasonably restrict or exclude such uses (see § 923.12(b)).

(iii) Amendments affecting criteria for designating or managing areas of particular concern, this will involve a determination that the management program, if changed, will continue to provide for:

(A) Criteria for designations (see § 923.21(b)(1));

(B) Designation of areas on a generic or site-specific basis (see § 923.21(b)(1) and (2));

(C) Description of how the management program addresses and resolves the management concerns for which areas are designated (see § 923.21(b)(3) and (4)); and

(D) Guidelines regarding priority of uses, including uses of lowest priority (see § 923.21(b)(5)).

(iv) For amendments affecting criteria for designating or managing areas for preservation or restoration, this will involve a determination that the management program, if changed, will continue to provide for criteria and procedures for designations that are for the purposes of preserving or restoring areas for their conservation, recreational, ecological or esthetic values (see § 923.22(b)).

(v) For amendments affecting procedures for considering the national interest in particular facilities, this will involve a determination that the management program, if changed, will continue to provide for:

(A) A description of the national interest in the planning for and siting of the facilities which is taken into account by the consideration procedures (see § 923.52(c)(1));

(B) The sources relied upon for such consideration (see § 923.52(c)(2));

(C) A clear and detailed description of the administrative procedures and decisions points where this interest will be considered (see § 923.52(c)(4)); and

(D) In the case of energy facilities, consideration of any applicable interstate energy plan or program developed pursuant to section 309 of the Act (see § 923.52(c)(3)).

(2) The procedural requirements of section 306(c) of the Act have been met. These procedural requirements are that:

(i) The State has developed the amendment with the opportunity for full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested public and private parties (section 306(c)(1) of the Act);

(ii) The State has coordinated the amendment with local, area-wide and interstate plans applicable to areas within the coastal zone affected by the amendment and existing on January 1 of the year in which the amendment request is submitted (section 306(c)(2));

(iii) Notice has been provided and a public hearing held on the proposed amendment (section 306(c)(1) and (c)(3); and

(iv) The Governor or the head of the State agency, designated pursuant to section 306(c)(5), has reviewed and approved the proposed amendment (section 306(c)(4)).

(b) If the Assistant Administrator, as a preliminary matter, determines that the management program, if changed, would no longer constitute an approvable program, or if any of the procedural requirements of section 306(c) of the Act have not been met, the Assistant Administrator shall advise the State in writing of the reasons why the amendment request cannot be considered.

(1) Where problems exist with respect to the procedural requirements, States may redress these and resubmit its amendment request.

(2) Where problems exist with respect to basic program approvability, States also may modify their amendment request to redress the deficiencies with repect to approvability and thereafter may resubmit their amendment request.

(3) Where a State acts to implement the amendment request despite the Assistant Administrator's notification that such amendment would render the managment program unapprovable, that State may be subject to withdrawal of program approval and withdrawal of administrative funding. (See 15 CFR 928.5(b).)

(c) If the Assistant Administrator, as a preliminary matter, determines that the management program, if changed, would still constitute an approvable program and that the procedural requirements of section 306(c) of the Act have been met, the Assistant Administrator will then determine, pursuant to the National Environmental Policy Act of 1969, as amended, whether an environmental impact statement (EIS) is required.

(1) If an EIS is appropriate, OCZM will prepare and distribute a DEIS and FEIS consistent with CEQ guidelines and NOAA procedures.

(i) Following review of comments on the FEIS, the Assistant Administrator will take final action to approve or disapprove the amendment request.

(ii) Notice of the Assistant Administrator's decision will be given in the FEDERAL REGISTER. If the Assistant Administrator's decision is to approve the amendment, the notice also shall indicate that Federal consistency applies as of the time of the Assistant Administrator's approval.

(2) If an EIS is not required pursuant to CEQ guidelines and regulations, notice will be published in the FEDERAL REGISTER of the Assistant Administrator's intent to approve the amendment request.

(i) This notice will include the content of the proposed amendment; the basis for determining an EIS is not required; and a specified comment period of not less than 30 days.

(ii) If no serious disagreement is raised by the head of a Federal agency (see § 923.83) during the comment period and after taking into account all comments received, the Assistant Administrator will make a final decision on whether to approve the proposed amendment and issue notice thereof in the FEDERAL REGISTER.

[44 FR 18595, Mar. 28, 1979, as amended at 47 FR 21024, May 17, 1982]

§ 923.83 Mediation of amendments.

(a) Section 307(h)(2) of the Act provides for mediation of "serious disagreements" between a Federal agency and a coastal State during administration of an approved management program. Accordingly mediation is available to states or federal agencies when a serious disagreement regarding a proposed amendment arises.

(b) Mediation may be requested by a Governor or head of a State agency designated pursuant to section 306(c)(5) or by the head of a relevant Federal agency. Mediation is a voluntary process in which the Secretary of Commerce attempts to mediate between disagreeing parties over major problems.

(c) The specific mediation procedures to be followed when there are serious disagreements over amendments are the same as those utilized for serious disagreements during program implementation. (See § 923.54).

§ 923.84 Routine program implementation.

(a) Further detailing of a State's program that is the result of implementing provisions approved as part of a State's approved management program, that does not result in the type of action described in § 923.80(c), will be considered routine program implementation. Routine implementation is not subject to the amendment procedures contained in §§ 923.81 through 923.82. It is subject to mediation provisions of § 923.83.

(b) *Requirements.* (1) States shall notify OCZM of routine program implementation actions in order that OCZM may review the action to ensure it does not constititute an amendment.

(i) States have the option of notifying OCZM of routine implementation on a case-by-case basis, periodically throughout the year, or annually.

(ii) In determining when and how often to notify OCZM of such actions, States should be aware that Federal consistency will apply only after the notice required by paragraph (b)(4) of this section has been provided.

(2) Concurrent with notifying OCZM, States shall provide notice to the general public and affected parties, including local governments, other State agencies and regional offices of relevant federal agencies of the notification given OCZM.

(i) This notice shall:

(A) Describe the nature of the routine program implementation;

(B) Indicate that the State considers it routine program implementation

nd has requested OCZM's concur-
ence in that determination; and
(C) Indicate that any comments on
hether or not the action does or does
constitute routine program imple-
entation may be submitted to OCZM
ithin 3 weeks of the date of issuance
the notice.
(ii) Where relevant Federal agencies
not maintain regional offices,
otice must be provided to the head-
arters office.
(3) Within 4 weeks of receipt of
otice from a State, OCZM shall
form the State whether it concurs
at the action constitutes routine
ogram implementation. Failure to
otify a State in writing within 4
eeks of receipt of notice shall be con-
dered concurrence.
(4) Where OCZM concurs, a State
en must provide notice of this fact
the general public and affected par-
es, including local governments,
her State agencies and relevant Fed-
al agencies.
(i) This notice shall:
(A) Indicate the date on which the
ate received concurrence from
CZM that the action constitutes rou-
e program implementation;
(B) Reference the earlier notice (re-
ired in paragraph (b)(2) of this sec-
on) for a description of the content
the implementation action; and
(C) Indicate if Federal consistency
plies as of the date of the notice
lled for is this paragraph.
(ii) Federal consistency shall not be
quired until this notice has been
ovided.
(5) Where OCZM does not concur, a
ate will be advised to submit the
tion as an amendment, subject to
e provisions of §§ 923.81 through
3.82.

bpart J—Applications for Program Development or Implementation Grants

23.90 General.

(a) The primary purpose of develop-
ent grants made pursuant to section
5 of the Act is to assist coastal
ates in the development of compre-
ensive coastal management programs
at can be approved by the Assistant
dminstrator. The primary purpose of implementation grants made pursuant to section 306 of the Act is to assist coastal States in implementing coastal management programs following their approval. The purpose of the guidelines in this subpart is to define the procedures by which grantees apply for and administer grants under the Act. These guidelines shall be used and interpreted in conjunction with the Office of Management and Budget Circular A-102, Administrative Requirements for Grants-in-Aid to State and local governments, and other directives from the NOAA and OCZM grants offices.

(b) Grants awarded to a State must be expended for the development or administration, as appropriate, of a management program that meets the requirements of the Act.

(c) All applications for funding under section 305 or 306 of the Act, including proposed work programs, funding priorities and allocations are subject to the administrative discretion of the Assistant Administrator.

(d) Grants shall not exceed eighty per cent of the annual total cost of the program.

(e) For purposes of this subpart, the term "development grant" means a grant awarded pursuant to subsection 305(a) of the Act. "Administrative grant" and "implementation grant" are used interchangeably and mean grants awarded pursuant to subsection 306(a) or (h) of the Act.

(f) All application and preapplication forms are to be requested from and submitted to:

National Oceanic and Atmospheric Administration, Office of Coastal Zone Management, Grants and Loans Operations Staff,
3300 Whitehaven Street, N.W., Washington, DC 20235.

§ 923.91 State responsibility.

(a) Applications for program grants shall be submitted by the Governor of a participating State or by the head of the State entity designated by the Governor pursuant to subsection 306(c)(5) of the Act.

(b) In the case of section 305 grant, the application shall designate a single State agency or entity to receive development grants and to be responsible for development of the State's coastal management program. The designee need not be that entity designated by the Governor pursuant to subsection 306(c)(5) of the Act as the single agency to receive and administer implementation grants.

(c) One State application will cover all program activities for which funds under this Act and matching State funds are provided, irrespective of whether these activities will be carried out by State agencies, areawide or regional agencies, local governments, or interstate entities.

(d) The designated State entity is fiscally responsible for all expenditures made under the grant, including expenditures by subgrantees and contractors.

§ 923.92 Allocation.

(a) Statutory Citations, Subsections 305(g):

> With the approval of the Secretary, any coastal state may allocate to any local government, to any areawide agency designated under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, to any regional agency, or to any interstate agency, a portion of any grant received by it under this section for the purpose of carrying out the provisions of this section.

Subsection 306(f):

> With the approval of the Secretary, a state may allocate to a local government, an areawide agency designated under section 204 Demonstration Cities and Metropolitan Development Act of 1966, a regional agency, or an interstate agency, a portion of the grant under this section for the purpose of carrying out the provisions of this section: Provided, that such allocation shall not relieve the state of the responsibility of ensuring that any funds so allocated are applied in furtherance of such state's approved management program.

(b) A State may allocate a portion or portions of its grant to other State agencies, local governments, areawide or regional agencies, interstate entities, of Indian tribes. If the work to result from such allocation(s) contributes to the effective development or implementation of the State's management program:

(1) *Local governments.* Should a State desire to allocate a portion of its grant to a local government, units of general-purpose local government are preferred over special-purpose units of local government.

(2) *Local governments.* Where a State will be relying on direct State controls as provided for in subsection 306(e)(1)(B) of the Act, pass-throughs to local governments for local planning, regulatory or administrative efforts under a section 306 grant cannot be made, unless they are subject to adequate State overview and are part of the approved management program. Where the approved management program provides for specified local activities or one-time projects, again subject to adequate State overview, then a proportional amount of administrative grant funds can be allocated to local governments.

(3) *Areawide agencies.* Should the State wish to allocate a portion of its program development grant to an areawide/regional agency under the provisions of subsection 305(g) of the Act, and in the absent of State law to the contrary, preference shall be given to those agencies recognized or designated as areawide/regional comprehensive planning and development agencies under the provisions of section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 or Title IV of the Intergovernmental Cooperative Act of 1968.

(4) *Indian Tribes.* In furtherance of the policy enunciated in § 923.33(b)(2), individual tribes or groups of tribes may be considered regional agencies and may be allocated a portion of a State's grant for the development of independent tribal coastal management programs or the implementation of specific management projects provided that:

(i) The State certifies that such tribal programs or projects are compatible with its approved coastal management policies; and

(ii) On excluded tribal lands, the State demonstrates that the tribal program or project would or could directly affect the State's coastal zone.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and

Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 18595, Mar. 28, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 923.93 Geographic segments.

(a) Application procedures for a grant to be awarded pursuant to subsection 306(h) of the Act for a geographic segment of a State's coastal zone are the same as those set forth in this subpart for a grant to administer the approved management program of the entire coastal zone of a State.

(b) When a State has a program for a geographic segment of its coastal zone approved pursuant to subsection 306(h) of the Act, that portion of a State's coastal zone not awarded segment approval will continue to be eligible for section 305 grants until authorization for such funds terminates.

§ 923.94 Eligible implementation costs.

(a) Costs claimed must be beneficial and necessary to the objectives of the grant project. As used herein the terms cost and grant project pertain to both the Federal and the matching share. Allowability of costs will be determined in accordance with the provisions of Federal Management Circular (FMC) 74-4: Cost Principles Applicable to Grants and Contracts with State and Local Governments.

(b) Federal funds awarded pursuant to section 306 of the Act may not be used for land acquisition purposes and may not be used for construction purposes except as described in paragraph (d) of this section.

(c) The primary purpose for which implementation funds, pursuant to section 306 of the Act, are to be used is to assure effective implementation and administration of the management program, including especially administrative actions to carry out and enforce program policies, authorities and other management techniques. Implementation activities should be related to achieving substantive results in the following 4 major areas, which are derived from the policies and findings of sections 302 and 303 of the Act:

(1) Protection of significant natural coastal resources, and areas including, as appropriate, wetlands, beaches, dunes, barrier islands, reefs and fisheries.

(2) Management of coastal development to:

(i) Prevent or mitigate loss of life and property in such coastal hazard areas as floodplains, erosion-prone areas, areas subject to subsidence or saltwater intrusion;

(ii) Provide priorities for water-dependent uses such as ports, fishing facilities and water-dependent energy facilities; and

(iii) Identify environmentally acceptable sites for dredge spoil disposal.

(3) Increase in public access for recreational purposes, including revitalization of urban waterfront and protection and restoration, where possible, of important historic, cultural and aesthetic coastal resources.

(4) Improvement in the predictability and efficiency of governmental decisionmaking especially with respect to permitting.

(d) Implementation funding may be applied to the management of designated areas of particular concern, especially areas designated for preservation or restoration purposes pursuant to section 306(c)(9) of the Act. Within areas designated for the purpose of restoring or preserving their ecological or conservation values, section 306 funds may be spent for projects involving expendable materials (as for example, seeds to be used as a non-structural erosion control technique or, for another example, materials to restore lighthouses designated as areas for restoration). All costs associated with such projects may not exceed a total of $50,000 per grant, except in the case of a demonstration grant which may be negotiated with and approved by the Assistant Administrator. In addition the following conditions must be met:

(1) The project must be consistent with and fulfill the objectives of a related policy (or policies) in the State's management program;

(2) Basic program administration requirements discussed in paragraph (c) of this section are provided for;

(3) No other sources of funding are readily available; and

(4) An explanation is provided of how the area will be maintained and operated once preserved or restored.

(e) Section 306 funding in support of any of these purposes, except as limited in paragraph (d) of this section, may be used to fund:

(1) Personnel costs,

(2) Supplies and overhead,

(3) Equipment (subject to the limitations in paragraph (f) of this section), and

(4) Feasibility studies and preliminary engineering reports. A feasibility study is defined as a document, independent of a particular design solution for a project, which presents an analysis of the economic practicality of the project. A preliminary engineering report is defined as a document which presents both engineering criteria, in sufficient detail to form the basis for the preparation of final design documents and detailed engineering cost estimates. Detailed architectural drawings and engineering specifications are eligible costs if:

(i) They are directly related to preservation and restoration projects discussed in (d) of this section;

(ii) They are for projects which are not in APC's but are directly related to the State's management program and the State can provide written documentation to OCZM that the other sources of funding have been secured to complete such projects.

(f) Equipment purchases by the grantee of more than one thousand (1,000) dollars per item require NOAA approval prior to purchase. Equipment purchases by sub-awardees may be approved by the grantee. Such purchases may be deemed eligible costs if the State:

(1) Has examined lease, rental or other non-purchase alternatives and purchase represents an equal or lesser cost alternative, and

(2) The equipment is essential to management activities that are anticipated to continue for more than 1 year.

(g) States are encouraged to coordinate administrative funding requests with funding possibilities pursuant to sections 308, 309, 310 and 315 of the Act. When in doubt as to the appropriate section of the Act under which to request funding, States should consult with OCZM. States should consult with OCZM on technical aspects of consolidating requests into a single application.

§ 923.95 Application for initial program development or implementation grants.

(a) The form SF-424, and an Application for Federal Assistance (Non-Construction Programs) constitutes the formal application. An original and two (2) copies must be submitted 45 days prior to the desired grant beginning date. The application must be accompanied by evidence of compliance with E.O. 12372 requirements including the resolution of any problems raised by the proposed project. Grants will not be awarded until A-55 requirements have been completed.

(b) States have the option of using a Preapplication for Federal Assistance. If used, the Preapplication must be submitted 120 days prior to the beginning date of the requested grant. The Preapplication shall include documentation, signed by the Governor, designating the State office, agency, or entity to apply for the administer the grant.

(c) Costs claimed as charges to the grant project must be beneficial and necessary to the objectives of the grant project. As used herein, the terms "cost" and "grant project" pertain to both the Federal grant and the matching share. Allowability of costs will be determined in accordance with the provisions of FMC 74-4: Cost Principles Applicable to Grants and Contracts with State and Local Governments. Eligible implementation costs also shall be determined in accordance with § 923.94 of these regulations.

(d) In Part IV—Program Narrative of the Form SF-424, the applicant shall describe clearly and briefly the activities that will be undertaken with grant funds in support of implementation and administration of the management program. This description shall include:

(1) An identification of those elements of the approved management program that are to be supported in whole or in part by the Federal and the matching share,

(2) A clear statement of the major tasks required to implement each element,

(3) For each task:

(i) Specify how it will be accomplished and by whom;

(ii) Identify any sub-awardees (other State agencies, local governments, individuals, etc.) that will be allocated responsibility for carrying out all or portions of the task, and indicate the estimated cost of the sub-awards for each allocation. Identify, if any, that portion of the task that will be carried out under contract with private firms or individuals and indicate the estimated cost of such contract(s);

(iii) Indicate the estimated total cost. Also indicate the estimated total person-months if any, allocated to the task from the applicant's staff;

(iv) Indicate the percent estimated to be completed during the grant period.

(4) The sum of all task costs in paragraph (d)(3) of this section should equal the total estimated grant project cost.

(5) Using two categories, Professional and Clerical, indicate the total number of personnel in each category on the applicant's staff who will be assigned to the grant project. Also indicate the number assigned full time and the member assigned less than full time in the two categories. Additionally, indicate the number of new positions created in the two categories as a result of the grant project.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 18595, Mar. 28, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 923.96 Applications for subsequent program development grants.

(a) Subsequent development grants will follow the procedures set forth in § 923.95. Additionally, the program design discussed in § 923.95(d) shall be updated to:

(1) Describe the anticipated design and content of the management program, including the major issues the program will address, and the policies and management techniques that will be proposed to address these issues;

(2) Describe how the past year's work contributed to the accomplishment of the overall program design and specifically to meeting the requirements for program approval;

(3) Examine and assess the need, if any, to modify the overall program design or the program's goals and objectives or both in view of the above or any emerging opportunities or problems; and

(4) Indicate when the State will submit a management program to the Assistant Administrator for review and final approval pursuant to section 306 of the Act or for preliminary approval pursuant to subsection 305(d) of the Act.

(b) In evaluating whether a State is making satisfactory progress toward completion of an approvable management program which is necessary to establish eligibility for subsequent grants, the Assistant Administrator will consider:

(1) The progress made toward meeting management program goals and objectives;

(2) The progress demonstrated in completing the past year's work program;

(3) The cumulative progress toward meeting the requirements for preliminary or final approval of a coastal management program;

(4) The applicability of the proposed work program to fulfillment of the requirements for final approval; and

(5) The effectiveness of mechanisms for insuring public participation and consultation with affected Federal, State, regional and local agencies in program development.

§ 923.97 Applications for subsequent program implementation grants.

(a) Second and subsequent year applications will follow the procedures set forth in § 923.95 except that:

(1) The Governor's document designating the State agency to receive and administer the grant is not required unless there has been an approved change of designation; and

(2) Copies of the approved management program and approved changes are not required.

(b) No award for continued funding pursuant to section 306 will be made until an evaluation of the State's program pursuant to section 312 of the Act has been conducted and findings have been made by the Assistant Administor.

§ 923.98 Applications for preliminary approval grants.

(a) The primary purposes of preliminary approval grants are to assist a State in insuring ultimate implementation of a fully developed program design and to provide for initial implementation of approved management elements. The purpose of these guidelines is to define the procedures by which grantees apply for and administer grants under the Act.

(b) The following represent allowable subsection 305(d) costs:

(1) Resolving section 306 deficiencies;

(2) Implementing those portions of a State's coastal management program for which sufficient authorities and organizational structures are in place;

(3) Updating coastal management programs if this updating would be an allowable cost after section 306 approval.

(c) The Form SF-424 and the Application for Federal Assistance (Non-Construction Programs), constitutes the formal application. An original and two (2) copies must be submitted at least 45 days prior to the desired grant beginning date. The application must be accompanied by evidence of compliance with E.O. 12372 requirements including the resolution of any problems raised by the proposed project. A grant will not be awarded until E.O. 12372 requirements have been completed.

(d) In Part IV, Program Narrative of the Form SF-424, the applicant should respond to the following requirements:

(1) Set forth a work program describing the activities to be undertaken during the grant period. This work program shall include:

(i) A precise description of each major task to be undertaken to resolve section 306 deficiencies, and a specific timetable for remedying these deficiencies;

(ii) A precise description of implementation activities for approved management components, including a demonstration that these implementation funds will not be applied outside the approval coastal management boundaries;

(iii) A precise description of any other tasks necessary for and allowable under subsection 305(d);

(iv) For each task, identify any subawardees that will be allocated responsibility for carrying out all or portions of the tasks, and indicate the estimated cost of the subaward for each allocation, Identify, if any, that portion of the task that will be carried out under contract with consultants and indicate the estimated cost of such contract(s); and

(v) For each task, indicate the estimated total cost. Also, indicate the estimated total person-months of effort, if any, allocated to the task from the applicant's staff.

(2) The sum of all task cost in the above paragraph should equal the total estimated grant project cost.

(3) Using two categories, Professional and Clerical, indicate the total number of personnel in each category on the applicant's staff that will be assigned to the grant project. Also indicate the number assigned full time and the number assigned less than full time in the two categories. Additionally, indicate the number of new positions created in the two categories as a result of the grant project.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 18595, Mar. 28, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 923.99 Approval of applications.

(a) The application for a grant by any coastal State which complies with the policies and requirements of the Act and these guidelines shall be approved by the Assistant Administrator, assuming available funding.

(b) Should an application be found deficient, the Assistant Administrator will notify the applicant in detail of any deficiency when an application fails to conform to the requirements of the Act or these regulations. Conferences may be held on these matters. Corrections or adjustments to the application will provide the basis for resubmittal of the application for further consideration and review.

(c) The Assistant Administrator may, upon finding of extenuating circumstances relating to applications for assistance, waive appropriate administrative requirements contained in this subpart.

§ 923.100 Grant amendments.

(a) Actions which require an amendment to a grant award such as a request for additional Federal funds, changes in the amount of the non-Federal share, changes in the approved project budget as specified in Attachment K of OMB Circular A-102, or extension of the grant period must be submitted to the Assistant Administrator and approved in writing by him/her and the NOAA Grants Officer prior to initiation of the contemplated change. Such requests should be submitted at least 30 days prior to the proposed effective date of the change and, if appropriate, accompanied by evidence of compliance with A-95 requirements.

(b) NOAA shall acknowledge receipt of the grantee's request within the ten (10) working days of receipt of the correspondence. This notification shall indicate NOAA's decision regarding the request; or indicate a time-frame within which a decision will be made.

Subpart K—Improving Coastal Zone Management

AUTHORITY: Secs. 303 and 306, Coastal Zone Management Act and sec. 5, Coastal Zone Management Improvement Act of 1980.

SOURCE: 47 FR 21019, May 17, 1982, unless otherwise noted.

§ 923.101 General.

(a) Statutory citations:

(1) Section 303(2)

The Congress finds and declares that it is the national policy—

* * * * *

(2) To encourage and assist the States to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values as well as to the needs for economic development, which programs should at least provide for—

(A) The protection of natural resources, including wetlands, floodplains, estuaries, beaches, dunes, barrier islands, coral reefs, and fish and their habitat, within the coastal zone,

(B) The management of coastal development to minimize the loss of life and property caused by improper development in flood-prone, storm surge, geological hazard, and erosion-prone areas and in areas of subsidence and saltwater intrusion and by the destruction of natural protective features such as beaches, dunes, wetlands, and barrier islands,

(C) Priority consideration being given to coastal-dependent uses and orderly processes for siting major facilities related to national defense, energy, fisheries development, recreation, ports and transportation, and the location, to the maximum extent practicable, of new commercial and industrial developments in or adjacent to areas where such development already exists,

(D) Public access to the coasts for recreation purposes,

(E) Assistance in the redevelopment of deteriorating urban waterfronts and ports, sensitive preservation and restoration of historic, cultural, and esthetic coastal features,

(F) The coordination and simplification of procedures in order to ensure expedited governmental decisionmaking for the management of coastal resources,

(G) Continued consultation and coordination with, and the giving of adequate consideration to the views of, affected Federal agencies,

(H) The giving of timely and effective notification of and opportunities for public and local government participation in coastal management decisionmaking, and

(I) Assistance to support comprehensive planning, conservation, and management for living marine resources, including planning for the siting of pollution control and aquaculture facilities within the coastal zone.

(2) Section 306(a).

The Secretary may make grants to any coastal State for not more than 80 per centum of the costs of administering such State's management program if the Secretary—

(3) Finds, if such program has been administered with financial assistance under this section for at least one year, that the coastal State will expend an increasing portion of each grant received under this section (but not more than 30 per centum of the grant unless the State chooses to expend a higher percentage) on activities that will result in significant improvement being made in achieving the coastal management objectives specified in Section 303(2)(A)-(I).

(b) States whose approved programs have been administered for at least one year with section 306 funds must expend an "increasing proportion" of each subsequent section 306 financial assistance award on activities that will result in "significant improvement" in achieving certain national coastal management objectives. This subpart defines "significant improvement," describes the process for determining which significant improvement activities a State may perform, establishes the formula for determining "increasing proportion," and sets forth the consequences of failure to pursue significant improvements.

§ 923.102 Significant improvement defined.

(a) A "significant improvement" is an accomplishment that addresses any of the objectives of section 303(2)(A) through (I) by:

(1) Substantially expanding the scope of the approved program (such expansion of program scope includes, but is not limited to an amendment or routine program implementation), or

(2) Substantially strengthening the ability of the State to implement or enforce the approved program.

(b) Significant improvements include, but are not limited to, the following types of accomplishments:

(1) The adoption of new enforceable policies for coastal decisionmaking of the conversion of nonenforceable (encouragement) policies to enforceable policies. The State (or local government) may adopt new policies by legislation, rulemaking, memoranda of understanding, executive order or other legally sufficient means.

(2) The adoption of refined enforc able policies for coastal decisionmak ing including:

(i) More specific standards for th implementation of existing statutes.

(ii) Site specific management pla for areas designated as Areas of Pa ticular Concern and Areas for Prese vation or Restoration or other area beyond what is required by the ap proved program.

(3) The extension of existing en forceable coastal management policie to new geographic areas beyond wha is required by the approved program.

(4) Development of more effective o efficient administration of the ap proved management program includ ing:

(i) Improved capability of the coast al management agencies to implemen State coastal regulatory, planning, an management requirements containe in the approved program.

(ii) Streamlined intergovernmenta coordination and public participatio mechanisms.

(5) The following to the extent the exceed what is required by an ap proved program.

(i) Development of natural resourc information critical to making informed coastal management decisions.

(ii) Development and implementation of State and local strategies, projects, and management programs for coastal resources and uses.

§ 923.103 Selection and approval of activities leading to significant improvements.

(a) The State will take the initiative in proposing significant improvement activities. The State's financial assistance application will describe the management activities it will perform and the significant improvements it expects to achieve over the course of the next financial assistance award period. This description will clearly identify specific schedules and expected products.

(b) Based on the results of the continuing review described in 15 CFR Part 928, the Assistant Administrator will determine in consultation with the State if the management activities proposed by the State are likely to result in significant improvement in achieving the coastal management objectives of section 303(2)(A) through (I).

(c) The States and the Assistant Administrator will negotiate an agreement at the beginning of each financial assistance award period establishing: (1) The specific significant improvement objectives to be achieved during the financial assistance award period, (2) the Federal funds to be devoted to each task, and (3) the basis for assessing the State's progress in accomplishing each significant improvement task. The agreement will be included as part of the financial assistance award. There is no requirement that the State address each of the nine significant improvement objectives within an individual financial assistance award period.

(d) If unforeseen circumstances arise that affect the accomplishment of any significant improvement task, the State must provide the Assistant Administrator with prompt notice and negotiate with the Assistant Administrator any necessary changes to the schedule and products before the scheduled completion dates. The Assistant Administrator shall provide the State agency with a schedule for negotiation and a time certain when a decision will be available to the State agency. Any such changes will be made part of the agreement included in the financial assistance award.

(e) Significant improvements need not be achieved within the period of one financial assistance award if there is specific reason to identity a longer period.

§ 923.104 Establishing the "increasing proportion".

(a) During the first year a State is required to make significant improvements (its second 306 award), it must agree to expend 20 percent of the Federal share of its upcoming section 306 financial assistance award on activities designed to lead to significant improvements. Thereafter, the State must agree to constant incremental increases of at least one percent in each succeeding year. The amount to be spent on significant improvements will be determined by multiplying the applicable percentage by the amount of Federal funds actually received.

(b) In no case may a State be required to expend more on significant improvement activities than the incremental increases established by this section. However, States may voluntarily exceed the minimum requirement on significant improvement expenditures established by this section. The failure to make significant improvements as a result of those expenditures in excess of the minimum requirement will not result in any reduction in financial assistance under the provisions of § 928.5(a), unless such failure results in an unjustified deviation under § 928.5(b).

§ 923.105 Failure to agree to pursue significant improvements.

(a) If a State chooses not to pursue significant improvements in accordance with this subpart, the Secretary must withhold all financial assistance under section 306. However, a decision not to award section 306 funds does not necessarily require withdrawal of program approval. A State may continue to implement and enforce its approved program with State funds. Under these circumstances, a State will still be able to exercise its Federal consistency review rights under section 307 and will remain eligible for CEIP funds if it meets all other eligibility requirements.

(b) A discussion of the procedures by which the Assistant Administrator will evaluate whether a State has failed to make significant improvements is contained in 15 CFR Part 928, Review of Performance of State Coastal Management and Coastal Energy Impact Programs.

PART 924—MONITOR MARINE SANCTUARY

Sec.
924.1 Authority.
924.2 Description of the Sanctuary.
924.3 Activities prohibited within the Sanctuary.
924.4 Penalties for commission of prohibited acts.
924.5 Permitted activities.
924.6 Permit procedures and criteria.

Sec.
924.7 Certification procedures.
924.8 Appeals of administrative action.

AUTHORITY: Secs. 302 and 303, Pub. L. 92-532, as amended; 86 Stat. 1061 (16 U.S.C. 1432 and 1433).

SOURCE: 40 FR 21706, May 19, 1975, unless otherwise noted.

§ 924.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of the Act. The following regulations are issued pursuant to the authorities of sections 302(f), 302(g) and 303 of the Act.

§ 924.2 Description of the Sanctuary.

The Sanctuary consists of a vertical water column in the Atlantic Ocean one mile in diameter extending from the surface to the seabed, the center of which is at 35°00′23″ north latitude and 75°24′32″ west longitude.

§ 924.3 Activities prohibited within the Sanctuary.

Except as may be permitted by the Administrator, no person subject to the jurisdiction of the United States shall conduct, nor cause to be conducted, any of the following activities in the Sanctuary:

(a) Anchoring in any manner, stopping, remaining, or drifting without power at any time;

(b) Any type of subsurface salvage or recovery operation;

(c) Any type of diving, whether by an individual or by a submersible;

(d) Lowering below the surface of the water any grappling, suction, conveyor, dredging or wrecking device;

(e) Detonation below the surface of the water of any explosive or explosive mechanism;

(f) Seabed drilling or coring;

(g) Lowering, laying, positioning or raising any type of seabed cable or cable-laying device;

(h) Trawling; or

(i) Discharging waste material into the water in violation of any Federal statute or regulation.

§ 924.4 Penalties for commission of p hibited acts.

Section 303 of the Act authorizes t assessment of a civil penalty of n more than $50,000 for each violati of any regulation issued pursuant Title III of the Act, and further a thorizes a proceeding *in rem* again any vessel used in violation of a such regulation. Details are set out Subpart D of Part 922 of this chapt (39 FR 23254, 23257, June 27, 197 Subpart D is applicable to any stance of a violation of these regu tions.

§ 924.5 Permitted activities.

Any person or entity may conduct the Sanctuary any activity listed § 924.3 of this part if:

(a) Such activity is either: (1) F the purpose of research related to t MONITOR, or (2) pertains to salva or recovery operations in connecti with an air or marine casualty; and

(b) Such person or entity is in po session of a valid permit issued by t Administrator authorizing the condu of such activity; except that, permit is required for the conduct any activity immediately and urgent necessary for the protection of li property or the environment.

§ 924.6 Permit procedures and criteria.

(a) Any person or entity who wish to conduct in the Sanctuary an acti ty for which a permit is authorized § 924.5 (hereafter a permitted activit may apply in writing to the Admin trator for a permit to conduct such tivity citing this section as the ba for the application. Such applicati should be made to the Administrat National Oceanic and Atmospher Administration, U.S. Department Commerce, Washington, DC 202 Upon receipt of such application, t Administrator shall request, and su person or entity shall supply to t Administrator, such information a in such form as the Administrat may require to enable him to act up the application.

(b) In considering whether to gra a permit for the conduct of a perm ted activity for the purpose of search related to the MONITOR, t

Secretary shall evaluate such matters as: (1) The general professional and financial responsibility of the applicant; (2) the appropriateness of the research method(s) envisioned to the purpose(s) of the research; (3) the extent to which the conduct of any permitted activity may diminish the value of the MONITOR as a source of historic, cultural, aesthetic and/or maritime information; (4) the end value of the research envisioned; and (5) such other matters as the Administrator deems appropriate.

(c) In considering whether to grant a permit for the conduct of a permitted activity in the Sanctuary in relation to an air or marine casualty, the Administrator shall consider such matters as: (1) The fitness of the applicant to do the work envisioned; (2) the necessity of conducting such activity; (3) the appropriateness of any activity envisioned to the purpose of the entry into the Sanctuary; (4) the extent to which the conduct of any such activity may diminish the value of the MONITOR as a source of historic, cultural, aesthetic and/or maritime information; and (5) such other matters as the Administrator deems appropriate.

(d) In considering any application submitted pursuant to this Section, the Administrator may seek and consider the views of any person or entity, within or outside of the Federal Government, as he deems appropriate; except that, he shall seek and consider the views of the Advisory Council on Historic Preservation.

(e) The Administrator may, in his discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as he deems appropriate, except that the Administrator shall attach to any permit granted for research related to the MONITOR the condition that any information and/or artifact(s) obtained in the research shall be made available to the public. The Administrator may observe any activity permitted by this section; and/or may require the submission of one or more reports of the status or progress of such activity.

(f) A permit granted pursuant to this section is nontransferable.

(g) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (a) have been approved by the Office of Management and Budget under control number 0648–0141)

[40 FR 21706, May 19, 1975, as amended at 49 FR 1040, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 924.7 Certification procedures.

Any Federal agency which, as of the effective date of these regulations, already has permitted, licensed or otherwise authorized any prohibited activity in the Sanctuary shall notify the Administrator of this fact in writing. The writing shall include a reasonably detailed description of such activity, the person(s) involved, the beginning and ending dates of such permission, the reason(s) and purpose(s) for same, and a description of the total area affected. The Administrator shall then decide whether the continuation of the permitted activity, in whole or in part, or subject to such condition(s) as he may deem appropriate, is consistent with the purposes of Title III of the Act and can be carried out within these regulations. He shall inform the Federal agency of his decision in these regards, and the reason(s) therefore, in writing. The decision of the Secretary made pursuant to this section shall be final action for the purpose of the Administrative Procedure Act.

§ 924.8 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 924.6 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Secretary may request, and if he does, the Appellant shall provide, such additional information and in such form as the Secretary may request in order to enable him to act upon the appeal. If the Appellant has not requested a hearing, the Secretary shall decide the appeal upon: (1) The basis of the criteria set out in § 924.6(b) or (c) of this part, as appropriate, (2) information relative to the application on file in NOAA, (3) information provided by the Appellant, and (4) such other considerations as he deems appropriate. He shall notify the Appellant of his decision, and the reason(s) therefore, in writing within 30 days of the date of his receipt of the appeal.

(c) If the Appellant has requested a hearing, the Secretary shall grant an informal hearing before a Hearing Officer designated for that purpose by the Secretary after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall be held no later than 30 days following the Secretary's receipt of the appeal. The Appellant and any interested person may appear personally or by counsel at the hearing, present evidence, cross-examine witnesses, offer argument and file a brief. Within 30 days of the last day of the hearing, the Hearing Officer shall recommend in writing a decision to the Secretary based upon the considerations outlined in paragraph (b) of this section and based upon the record made at the hearing.

(d) The Secretary may adopt the Hearing Officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Secretary shall notify the Appellant of his decision, and the reason(s) therefore, in writing within 15 days of his receipt of the recommended decision of the Hearing Officer. The Secretary's action, whether without or after a hearing, as the case may be, shall constitute final action for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this Section may be extended by the Secretary for good cause, either upon the Secretary's own motion and upon written notification to an Appellant stating the reason(s) therefore, or upon the written request of an Appellant to the Secretary stating the reason(s) therefore, except that no time limit may be extended more than 30 days.

[40 FR 21706, May 19, 1975, as amended at 49 FR 1040, Jan. 6, 1984]

PART 926—COASTAL ZONE MANAGEMENT PROGRAM DEVELOPMENT GRANTS, ALLOCATION OF FUNDS TO STATES

Sec.
926.1 Purpose of rules and regulations.
926.2 Definitions.
926.3 Basis of allocation.
926.4 Allocation of non-distributed funds.
926.5 State allocation computation examples.
926.6 State allocations.
926.7 Duration of allocation.

AUTHORITY: Sec. 305(e), Pub. L. 92-583, as amended; 86 Stat. 1280 (16 U.S.C. 1454).

SOURCE: 40 FR 11863, Mar. 14, 1975, unless otherwise noted.

§ 926.1 Purpose of rules and regulations.

Twelve million dollars has been appropriated by the Congress for Fiscal Year 1975 to implement the Coastal Zone Management Act of 1972 (Pub. L. 92-583) as amended. Of this amount $9 million has been made available for coastal zone management program development grants-in-aid to the 34 coastal States and territories under section 305 of that Act. It is the purpose of this part to establish the rules and regulations for allocation of grant-in-aid funds under section 305 of the Coastal Zone Management Act of 1972, as amended (Pub. L. 92-583; 86 Stat. 1280; and Pub. L. 93-612; 88 Stat. 1974) pursuant to the requirements of section 305(e) which states:

> Grants under this section shall be allocated to the States based on rules and regula

best copy available

tions promulgated by the Secretary: *Provided, however,* That no management program development grant under this section shall be made in excess of 10 percentum nor less than 1 percentum of the total amount appropriated to carry out the purposes of this section: *And provided further,* That the Secretary shall waive the application of the 1 percentum minimum requirement as to any grant under this section, when the coastal State involved requests such a waiver.

§ 926.2 Definitions.

As used in this part, the following terms shall have the meanings indicated below:

(a) The term "Act" means the Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280, as amended by Pub. L. 93-612, 88 Stat. 1974.

(b) "Secretary" means the Secretary of Commerce or his designee.

(c) "Coastal State" means a State of the United States in, or bordering on, the Atlantic, Pacific or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes. The term also includes specifically Puerto Rico, the Virgin Islands, Guam and American Samoa. This definition is interpreted as including the following States and territories:

1. Alabama
2. Alaska
3. American Samoa
4. California
5. Connecticut
6. Delaware
7. Florida
8. Georgia
9. Guam
10. Hawaii
11. Illinois
12. Indiana
13. Louisiana
14. Maine
15. Maryland
16. Massachusetts
17. Michigan
18. Minnesota
19. Mississippi
20. New Hampshire
21. New Jersey
22. New York
23. North Carolina
24. Ohio
25. Oregon
26. Pennsylvania
27. Puerto Rico
28. Rhode Island
29. South Carolina
30. Texas
31. Virginia
32. Virgin Islands
33. Washington
34. Wisconsin

(d) "Shoreline" means, in tidal waters, the length of "tidal shoreline" as defined by the National Ocean Survey, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, and published in that agency's brochure, "The Coastline of the United States." For purposes of computation of the nation's total "tidal shoreline", figures for the Canal Zone, Navassa, Swan Islands, and Baker, Howland, Jarvis, Johnston, Midway, Palmyra, and Wake Islands shall not be included. "Shoreline", in Great Lakes States, shall mean the length of shoreline as established by the Lake Survey Center, National Ocean Survey, NOAA, U.S. Department of Commerce, and contained in an unpublished manuscript entitled, "Shoreline of the Great Lakes and Connecting Rivers" by Robert Hagen and P. H. Judd, dated 1948, with additions made in 1952 by G. E. Ropes and E. F. Kulp, Jr. The total "shoreline" of the United States shall be the sum of the tidal shoreline and Great Lakes shoreline, as defined above.

(e) "Coastal counties" means those counties or parishes which appear, in the judgment of the Assistant Administrator for Coastal Zone Management, NOAA, to abut upon coastal waters. A listing of such counties is available for inspection at the Office of Coastal Zone Management, NOAA, U.S. Department of Commerce, Rockville, Maryland 20852.

§ 926.3 Basis of allocation.

(a) Funds available under section 305 will be allotted to the 34 coastal States and territories on the following basis:

(1) *Uniform allocation.* Each State will initially be allotted the legal minimum of 1 percent of funds available, regardless of size, length of coastline, population, or other factors.

(2) *Variable allocation.* The amount remaining after allocation of the uniform amount will be allocated as follows:

(i) *Shoreline criterion.* Forty percent will be allocated to the coastal States and territories on the basis of shoreline. Each State or territory will receive a shoreline allotment equal to the total amount available under this criterion multiplied by a factor equal to the ratio of that State or territorial shoreline divided by the total national shoreline (including Great Lakes).

(ii) *Population criterion.* Forty percent will be allocated to the coastal States and territories on the basis of coastal population. It is the intent of the Office of Coastal Zone Management to include that population which is included within the "coastal zone" as defined in section 304(a) of the Act and as used in the allocation system for grants under section 306 as described in section 306(b). However, since no State or territory has as yet formally identified its "coastal zone" pursuant to the Act, the Office will initially utilize the population of the coastal zone as recorded in the 1970 decennial U.S. Census contained within coastal counties (or parishes) as defined in § 926.2. Since this designation is judgmental, it is subject to change in subsequent fiscal years, based upon the inclusion or exclusion of certain counties, or upon definition of the coastal zone by a State. The coastal population used herein has been increased from that computed for FY 1974 by the inclusion of additional counties in California, Florida, Louisiana, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Ohio, South Carolina, Texas and Virginia.

(iii) *Needs criterion.* Twenty percent will be reserved for additional allocation to the coastal States and territories at the discretion of the Assistant Administrator for Coastal Zone Management, based upon demonstration of need for such funds in order to assure completion of work designated by the State or territory as necessary to the timely completion of a coastal zone management program. Examples of such need may include, but need not be limited to:

(A) States or territories which have a legislative mandate, or express a strong desire to complete development of their programs in less than three
years and specifically require suc
funds.

(B) States or territories which co
tain geographic coastal areas with pa
ticularly pressing developmental pro
lems whose resolution in a manag
ment program would be materially a
sisted by additional funds.

(C) States or territories which pr
pose particularly creative or innov
tive elements in the management pr
gram development phase where ther
is apparent national applicability.

(D) States or territories where sp
cial institutional conditions exi
which require additional funds and fo
which adequate account is not made
the shoreline and/or population crit
ria.

(b) The minimum figure shown fo
each coastal State or territory
§ 926.6 represents the sum of the un
form allocation, and the shoreline an
population criteria of the variable all
cation only; it does not include any a
location under the needs criterio
Such funds will be available to the
for Fiscal Year 1975, in the event the

(1) Choose to participate in the pr
gram,

(2) Can provide the necessar
matching funds,

(3) Submit a satisfactory applicatio
and work program pursuant to th
conditions set forth in Part 920 of thi
chapter, and

(4) Otherwise meet the applicabl
requirements of the Coastal Zon
Management Act of 1972, as amende

States need not utilize nor be limite
by the minimum amount allocated an
applications may be made for an
amount deemed appropriate: *Provid
ed,* That the statutory maximum o
minimum of 10 percent and 1 percen
of all appropriations, respectively,
not exceeded, except upon request of
State for waiver of the 1 percent mini
mum.

§ 926.4 Allocation of non-distribute funds.

Those funds allocated to coasta
States and territories which choos
not to participate in the program a
well as those funds which are allocat
ed but which States or territorie
choose not to utilize, will be added to

those funds to be distributed to the States and territories on the basis of the needs criterion, as will any amounts in excess of the 10 percent maximum limitation.

§ 926.5 State allocation computation examples.

The following computation indicates the procedure by which a State's minimum allocation is derived. As an example, the State of Massachusetts was selected.

Basic information:

U.S. shoreline: 95,223 miles.
Massachusetts shoreline: 1,519 miles.
U.S. coastal population: 89,086,762.
Massachusetts coastal population: 2,862,290.

Total funds available for sec. 305 grants in fiscal year 1975: $9,000,000.

National allocation by criteria:	
Uniform allocation: 1 percent ×$9,000,000×34 States	$3,060,000
Variable allocation:	
Shoreline criterion: 40 percent ×($9,000,000 ' 3,060,000)	2,376,000
Population criterion: 40 percent ×($9,000,000 ' 3,060,000)	2,376,000
Needs criterion: 20 percent ×($9,000,000'3,060,000)	1,188,000
Total	9,000,000
Minimum State allocation (Massachusetts):	
Uniform allocation: 1 percent ×$9,000,000	90,000
Variable allocation:	
Shoreline criterion:	
1,519 miles 95,223 miles×$2,376,000	
Population criterion:	
2,862,290 89,086,762×$2,376,000	76,270
Minimum Massachusetts allocation	204,048

To this minimum allocation may be added an appropriate amount from the needs criterion funds.

§ 926.6 State allocations.

Using the method described in § 926.5 of this part, allocations (excluding needs criterion funds) for each eligible State and territory follow:

1. Alabama [1]	$115,000
2. Alaska (maximum)	900,000
3. American Samoa	94,000
4. California	620,000
5. Connecticut	156,000
6. Delaware	114,000
7. Florida	446,000
8. Georgia	156,000
9. Guam	95,000
10. Hawaii	137,000
11. Illinois	248,000
12. Indiana	111,000
13. Louisiana	342,000
14. Maine	189,000
15. Maryland	249,000
16. Massachusetts	204,000
17. Michigan	301,000
18. Minnesota	101,000
19. Mississippi	105,000
20. New Hampshire	99,000
21. New Jersey	284,000
22. New York	567,000
23. North Carolina	188,000
24. Ohio	178,000
25. Oregon	156,000
26. Pennsylvania	169,000
27. Puerto Rico	180,000
28. Rhode Island	125,000
29. South Carolina	176,000
30. Texas	254,000
31. Virginia	222,000
32. Virgin Islands	96,000
33. Washington	233,000
34. Wisconsin	162,000
Subtotal	7,772,000
Needs criterion allocation [2]	1,228,000
Total	9,000,000

[1] Rounded to nearest $1,000.
[2] Includes $42,271 excess over 10 percent limit in Alaska.

§ 926.7 Duration of allocation.

The allocations as determined and computed above are published for the distribution of coastal zone management program development grants during Fiscal Year 1975, which is the second year for which these funds are available. NOAA will monitor the progress of States under this program and make an assessment during Fiscal Year 1975 of the relative financial needs of the States. This assessment may lead to alterations in the method of allocation and the allocation figures for fiscal years subsequent to Fiscal Year 1975. Such revisions will be duly published.

PART 927—ALLOCATION OF SECTION 306 PROGRAM ADMINISTRATION GRANTS

§ 927.1 Allocation formula.

(a) *Statutory citation.* (1) Section 306(a).

The Secretary may make grants to any coastal State for not more than 80 per centum of the costs of administering such State's management program . . .

(2) Section 306(b).

Such grants shall be allocated to the States with approved programs based on rules and regulations promulgated by the Secretary which shall take into account the extent and nature of the shoreline and area covered by the plan, population of the area, and other relevant factors: *Provided,* That no annual grant made under this section shall be less than one per centum of the total amount appropriated to carry out the purposes of this section: *And provided further,* That the Secretary shall waive the application of the one per centum minimum requirement as to any grant under this section, when the coastal State involved requests such a waiver.

(b) *Minimum/maximum allocation.* The Assistant Administrator may establish minimum and maximum State allocations.

(c) *Allocation formula factors and weighting.* Each State eligible to receive a financial assistance award shall be allocated an amount of the total available Federal funding based on:

(1) A minimum share (established by the Assistant Administrator) of the total funding available for allocation to eligible State coastal management programs, plus

(2) A proportionate share of the remainder to be divided as follows:

(i) Sixty percent will be allocated based on each eligible State's proportionate share of the length of tidal shoreline and/or Great Lake shoreline mileage of all participating States based on the most recently available data from or accepted by the National Ocean Survey, and

(ii) Forty percent will be allocated on each eligible State's proportionate share of the aggregate population of all coastal counties contained in whole or in part within the designated coastal boundary of all eligible State coastal programs based on official data or the most recent U.S. census.

(3) Should any State's base allocation exceed the maximum established by the Assistant Administrator, the excess amount shall be subtracted from the established maximum and redistributed proportionately among those eligible States with allocations not exceeding the established maximum.

(d) *Use of the allocation formula.* The allocation formula shall be used to establish base level allocations for each State coastal management program eligible to receive Federal funding.

(e) *Adjustment for phase down of Federal funding.* The Assistant Administrator may adjust base level allocations as necessary to implement a phase down of Federal financial support. Any such adjustment shall be implemented in a manner which gives some priority to recently approved State coastal management programs. Options for implementation of a phase down will be submitted to the States for review and comment.

(f) *Calculation of financial assistance award levels.* Actual financial assistance award levels will be set from base level allocations, any adjustments under paragraph (e) of this section, and in accordance with the provisions of section 312(a), (c), and (d). Award levels may fall below the one percent minimum established under section 306(b) for purposes of implementing section 312(c) of the Act.

(Secs. 306 and 317 of the Coastal Zone Management Act)

[47 FR 21021, May 17, 1982]

PART 928—REVIEW OF PERFORMANCE

Sec.
928.1 General.
928.2 Definitions.
928.3 Procedure for conducting continuing reviews of approved State CZM programs and State coastal energy impact programs.
928.4 Public participation.
928.5 Enforcement.

AUTHORITY: Secs. 312 and 316, Coastal Zone Management Act, as amended.

SOURCE: 47 FR 21021, May 17, 1982, unless otherwise noted.

§ 928.1 General.

(a) These regulations set forth the requirements for review of approved State Coastal Zone Management (CZM) programs pursuant to section 312 of the Act, and of State coastal energy impact programs pursuant to sections 312 and 316 of the Act. They define "continuing review" and other important terms, and set forth the procedures for:

(1) Conducting continuing reviews of approved State CZM programs and State coastal energy impact programs,

(2) Providing for public participation,

(3) Reducing financial assistance for failure to make significant improvement, and

(4) Withdrawing program approval and financial assistance.

§ 928.2 Definitions.

(a) "Continuing review" means monitoring State performance throughout the period of the work program. As part of the continuing review, evaluations of approved CZM programs will be conducted and written findings will be produced at least once every two years but not more than once every year. Evaluations of coastal energy impact programs will be conducted on a schedule to be determined by the Assistant Administrator.

(b) "Adherence" means to comply with the approved CZM program and financial assistance award or work program.

(c) "Justifiable" means that the State must show that the deviation(s) from the approved CZM program was warranted. This determination will be made by the Assistant Administrator in consultation with the State on a case-by-case basis. The principal criterion to be used in making this determination is the extent to which the deviation was beyond State control. Other criteria, including, but not limited to, the following will be considered:

(1) The extent to which the deviation impairs the ability of the program to achieve its goals and objectives;

(2) Whether the deviation is part of a pattern or is an isolated incident;

(3) The magnitude of the deviation.

(d) "Approved CZM program" means those elements of the program required for program approval by the Secretary, under 15 CFR Part 923 (Development and Approval Provisions), including any changes to those elements made by approved amendments and routine program implementation.

(e) "Financial assistance award" means a legal instrument that creates a relationship between the Federal government and another entity (recipient). The principal purpose of the award is the transfer of money or services in order to accomplish a public purpose authorized by Federal statute. The term "financial assistance award" encompasses grants, loans, and cooperative agreements. The following elements constitute the award:

(1) The work program described in the approved application;

(2) The budget;

(3) The standard terms and conditions of the award;

(4) Any special award conditions included with the award;

(5) The statutes and regulations under which the award is authorized; and

(6) Applicable OMB cost principles and administrative requirements.

(f) "Work program" means a description of the tasks to be undertaken by a State for a given time period for the purpose of implementing and enforcing an approved CZM program. The work program is submitted as a part of a Federal financial assistance application, or separately in the absence of Federal financial assistance.

(g) "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management or the NOAA Official responsible for directing the Federal coastal zone management program.

§ 928.3 Procedure for conducting continuing reviews of approved State CZM programs and State coastal energy impact programs.

(a) Statutory citations: (1) Subsection 312(a).

> The Secretary shall conduct a continuing review of the performance of coastal States with respect to coastal management. Each review shall include a written evaluation with an assessment and detailed findings concerning the extent to which the State has implemented and enforced the program approved by the Secretary, addressed the coastal management needs identified in Section 303(2)(A)-(I), and adhered to the terms of any grant, loan, or cooperative agreement funded under this title.

(2) Section 316. Section 316 includes a provision for a biennial Coastal Zone Management Report which must include:

* * * a description of the economic, environmental, and social consequences of energy activities affecting the coastal zone and an evaluation of the effectiveness of financial assistance under Section 308 in dealing with such consequences.

(b) Continuing review procedures. (1) Each State will submit a financial assistance application or work program, whichever is applicable, on a timetable negotiated with the Assistant Administrator, describing the tasks to be undertaken by the State for the purpose of implementing and enforcing its approved CZM program.

(2) For the purpose of evaluation, the States will submit performance reports as specified in the Special Award Conditions, or, if the State is not receiving an award, as negotiated with the Assistant Administrator. The reports will address all areas identified in each State's Performance Report Guidelines.

(3) The Assistant Administrator will collect information on the State CZM programs on a continuing basis. At the beginning of each evaluation, the Assistant Administrator will analyze available information, identify information gaps, and formulate any additional information needs that will be the subject of a supplemental information request to the State.

(4) The Assistant Administrator may conduct a site visit as a part of the evaluation.

(5) Draft findings of the evaluation will be transmitted to the State. The State will have a minimum of two weeks from receipt of the draft findings to review them and provide comments to the Assistant Administrator. This review time may be extended upon request from the State.

(6) Within two weeks from receipt of the draft findings, a State may request a meeting with the Assistant Administrator to discuss the draft findings and the State's comments.

(7) Within 45 days of receipt of State comments, the Assistant Administrator will issue final findings. This period may be extended upon notification to the State. Notice of the availability of the final findings will be published in the FEDERAL REGISTER. Copies will be sent to the head of the State CZM agency, the State program manager, and any person who requests them.

(c) Requirements for continuing review of approved State CZM programs.

(1) *Scope of continuing reviews.* The continuing review of a State's approved CZM program will include an evaluation of the extent to which the State has:

(i) Implemented and enforced the program approved by the Secretary;

(ii) Addressed the coastal management needs identified in section 303(2)(A) through (I); and

(iii) Adhered to the terms of financial assistance awards.

(2) *Procedure for assessing adherence to the approved CZM program.* (i) In reviewing adherence of a State to its approved CZM program, the Assistant Administrator will evaluate all aspects of the "approved CZM program" as defined in § 928.2(d). The evaluation will examine the extent to which:

(A) The State is implementing and enforcing its approved CZM program;

(B) The management agency is effectively playing a leadership role in coastal issues, monitoring the actions of appropriate State and local agencies for compliance with the approved CZM program, and assuring the opportunity for full participation of all interested entities in CZM program implementation; and

(C) The management agency is effectively carrying out the provisions of Federal consistency.

(ii) The findings concerning the State's adherence to its approved CZM program will be used in negotiating the next financial assistance award or work program, whichever is applicable.

(3) *Procedure for assessing how the State has addressed the coastal management needs identified in section 303(2)(A) through (I).* The assessment of the extent to which the State has addressed the coastal management needs identified in section 303(2)(A) through (I) will occur as follows:

(i) The State, in its performance report, will provide the Assistant Administrator with a listing of all actions it is taking during the performance report period to address the national coastal management needs and how these actions relate to conditions in the State and the objectives and priorities in the State CZM program.

(ii) The Assistant Administrator, in the evaluation findings, will assess the extent to which the State's actions are targeted to meeting identified "needs" and the effectiveness of the actions in addressing those needs. Based on this assessment, the Assistant Administrator will make findings and recommendations of the extent to which each State is addressing the coastal management needs identified in Section 303.

(iii) The findings and recommendations concerning how the State has addressed the coastal management needs of section 303 will be used by the Assistant Administrator in negotiating the next financial assistance award, if any. The evaluation required by section 312(c), concerning whether a coastal State is "failing to make significant improvement in achieving the coastal management objectives," is detailed in § 928.5(a).

(4) *Procedure for assessing adherence to the terms of financial assistance awards.* (i) Adherence to financial and administrative terms of each financial assistance award will be determined by the NOAA Grants Office and the Department of Commerce Inspector General. Adherence to programmatic terms of each financial assistance award will be determined by the Assistant Administrator and the NOAA Grants Office. These determinations will be made in accordance with the requirements outlined in these regulations, the findings of a financial audit of the award, and the following criteria:

(A) Compliance with the statute, regulations, and applicable OMB circulars;

(B) Submission of required reports and satisfactory completion of work products as described in the approved application and within the timeframe specified;

(C) Compliance with Standard Terms and Conditions and Special Award Conditions within the specified timeframes;

(D) Use of award funds only for approved projects; and

(E) Substantive modification of approved projects only with the prior agreement of NOAA.

(ii) The findings concerning adherence to the terms of financial assistance awards will be used in negotiating the next financial assistance award, if any.

(d) Requirements for continuing review of State coastal energy impact programs.

(1) *Scope of continuing reviews.* The continuing review of State coastal energy impact programs will include the following elements:

(i) An evaluation of the State's adherence to the terms of financial assistance awards;

(ii) An evaluation of the relationship between coastal energy impact projects and the approved CZM program;

(iii) A description of energy activities in coastal areas and the impact resulting from these activities; and

(iv) An evaluation of the effectiveness of the coastal energy impact program in dealing with these consequences.

(2) *Procedure for assessing adherence to the terms of financial assistance awards.* See § 928.3(c)(4).

§ 928.4 Public participation.

(a) Statutory citation, section 312(b):

> For the purpose of making the evaluation of a coastal State's performance, the Secretary shall conduct public meetings and provide opportunity for oral and written comments by the public. Each such evaluation shall be prepared in report form and the Secretary shall make copies thereof available to the public.

(b) Requirements. (1) The Assistant Administrator will publish a Notice of Intent to Evaluate in the FEDERAL REGISTER at least 45 days before the public meeting(s). The notice will include a Statement of the availability of the State's performance report and the supplemental information request.

(2) Each State will issue a notice of the public meeting(s) on its evaluation in the newspaper(s) of largest circulation in the coastal area where the meeting(s) is being held or take other reasonable action to inform the interested public, such as sending a notice

of the meeting(s) to persons on its mailing list and publishing a notice in its newsletter, at least 15 days before the date of the public meeting(s). The State will inform the public that oral or written comments will be accepted and that attendance at the public meeting(s) is not necessary for submission of written comments.

(3) Notice of the availability of final findings to the public upon request will be published in the FEDERAL REGISTER.

§ 928.5 Enforcement.

(a) Reduction of financial assistance for failure to make significant improvement. (1) Statutory citation section 312(c):

> The Secretary shall reduce any financial assistance extended to any coastal State under Section 306 (but not below 70 per centum of the amount that would otherwise be available to the coastal State under such section for any year), and withdraw any unexpended portion of such reduction, if the Secretary determines that the coastal State is failing to make significant improvement in achieving the coastal management objectives specified in Section 303(2)(A)-(I).

(2) Requirements. (i) The evaluation will examine whether the State is accomplishing the significant improvement tasks in accordance with specific schedules and expected products negotiated between the State and the Assistant Administrator before the beginning of each financial assistance award, in accordance with the procedures in 15 CFR 923.103.

(ii) If the Assistant Administrator finds, during the continuing review, that the State is not achieving one or more significant improvement objectives as negotiated, the State will be given an opportunity to demonstrate that it can accomplish the objective(s), as prescribed in the financial assistance award, before its expiration.

(iii) If the State cannot make this demonstration to the Assistant Administrator's satisfaction, the Assistant Administrator will determine that the State is failing to make satisfactory progress toward significant improvement in accordance with the previously negotiated agreement.

(iv) Based on this determination, the agency will reduce a State's financial assistance award and withdraw any unexpended portion of the current award by no more than the percentage required to be devoted to making significant improvements for that year. The reduction or withdrawal shall be proportional to the amount of funds allocated to tasks that have failed to result in satisfactory progress in achieving significant improvement.

(b) Withdrawal of program approval and financial assistance. (1) Statutory citation, sections 312(d) and 312(e):

> (d) The Secretary shall withdraw approval of the management program of any coastal State, and shall withdraw any financial assistance available to that State under this title as well as any unexpended portion of such assistance, if the Secretary determines that the coastal State is failing to adhere to, is not justified in deviating from (1) the management program approved by the Secretary, or (2) the terms of any grant or cooperative agreement funded under Section 306, and refuses to remedy the deviation.
>
> (e) Management program approval and financial assistance may not be withdrawn under Subsection (d), unless the Secretary gives the coastal State notice of the proposed withdrawal and an opportunity for a public hearing on the proposed action. Upon the withdrawal of management program approval under this Subsection (d), the Secretary shall provide the coastal State with written specifications of the actions that should be taken, or not engaged in, by the State in order that such withdrawal may be canceled by the Secretary.

(2) Requirements. (i) If the Assistant Administrator finds that a State is failing to adhere to, and is not justified in deviating from, its approved CZM program or those terms of its section 306 financial assistance award specifically implementing the approved CZM program, the agency will provide the State with written notice of this finding and the agency's obligation to withdraw program approval and financial assistance under this title. This notice will set forth the deviation(s) from the approved CZM program or the financial assistance award and will include specifications of the actions that must be taken in order to remedy the deviation(s). The State will be given 30 days from receipt of this notice to respond with evidence of adherence or justification for its deviation(s). During this 30-day

period, the State may request up to 30 additional days to respond, for a maximum of 60 days from receipt of notice.

(ii) If the State does not respond satisfactorily within the time allowed, the agency will notify the State of intent to take the proposed action. This notice will be published in the FEDERAL REGISTER and will inform the State of its right to a public hearing.

(iii) If the State does not request a public hearing or submit satisfactory evidence of adherence or justification within 30 days of publication of this notice, the agency will decide whether to withdraw program approval and financial assistance and the agency will notify the State in writing of the decision and the reasons for it. The notification will set forth actions by the State which would cause the Secretary to cancel the withdrawal.

(iv) If the State requests a public hearing within 30 days of publication of the notice of intent to withdraw program approval and financial assistance, the Assistant Administrator will publish 30 days advance notice of the hearing in the FEDERAL REGISTER and the newspaper(s) of largest circulation in the State's coastal zone. The hearing will be held in a location convenient to the citizens of the State's coastal zone and a record of the hearing will be maintained. Within 30 days of the completion of the hearing, the agency will make the determination as set forth in paragraph (b)(2)(iii) of this section.

(3) If program approval and financial assistance are withdrawn pursuant to this section, a notice will be placed in the FEDERAL REGISTER and Federal consistency under section 307 of the Act will cease to apply to the State's CZM program.

PART 929—KEY LARGO NATIONAL MARINE SANCTUARY FINAL REGULATIONS

Sec.
929.1 Authority.
929.2 Purpose.
929.3 Boundaries.
929.4 Definitions.
929.5 Management and enforcement.
929.6 Allowed activities.
929.7 Activities prohibited or controlled.
929.8 Other authorities.
929.9 Penalties for commission of prohibited acts.
929.10 Permit procedures and criteria.
929.11 Appeals of administrative action.

AUTHORITY: Title III of Pub. L. 92-532, 86 Stat. 1061, 1062 (16 U.S.C. 1431-1434).

SOURCE: 48 FR 55118, Dec. 9, 1983, unless otherwise noted.

§ 929.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of the Marine Protection, Research and Sanctuaries Act of 1972 as amended (the Act). The following regulations are issued pursuant to Title III of the Act.

§ 929.2 Purpose.

The purpose of designating the Key Largo National Marine Sanctuary is to protect and preserve the coral reef ecosystem in its natural state and to regulate uses within the Sanctuary to ensure the health and well-being of the coral and associated flora and fauna.

§ 929.3 Boundaries.

The Sanctuary consists of a portion of the Atlantic Ocean beginning at approximately three miles east of Key Largo, Florida, adjacent to the John Pennekamp Coral Reef State Park. The coordinates for the Sanctuary are: The point of beginning (POB) is at geographic coordinates 25° (degrees), 19.45′ (minutes) north latitude, 80°, 12.0′ west longitude, said point being the northeast boundary corner of John Pennekamp Coral Reef State Park. From said POB run thence southeasterly to geographic coordinates 25°, 16.2′ north latitude 80°, 8.7′ west longitude, said point also being on the 300 foot isobath, thence in a southwesterly direction to geographic coordinates 25°, 07.5′ north latitude, 80°, 12.5′ west longitude, thence again run in a southwesterly direction to geographic coordinates 24°, 58.3′ north latitude, 80°, 19.8′ west longitude, thence leaving said 300 foot isobath run northwesterly to geographic coordinates 25°, 2.2′ north latitude, 80°, 25.25′ west longitude, said point being the southeast boundary corner of John Pennekamp Coral Reef State Park, thence in a northeasterly direction along said easterly boundary of said State Park to the POB.

§ 929.4 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration (NOAA).

(b) "Assistant Administrator" means the Assistant Administrator for Ocean Services and Coastal Zone Management, National Oceanic and Atmospheric Administration, or his/her successor, or designee.

(c) "Persons" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, or any State or local unit of the government.

(d) "The Sanctuary" means the Key Largo National Marine Sanctuary.

(e) "Tropical fish" means fish and invertebrates of minimal sport and food value, usually brightly colored, often used for aquaria purposes and which live in a close interrelationship with corals and coral reef substrates.

§ 929.5 Management and enforcement.

The National Oceanic and Atmospheric Administration (NOAA) has primary responsibility for the management of the Sanctuary pursuant to the Act. NOAA's responsibilities under the Act require that the Sanctuary Programs Division review, consider, and approve any activities that take place in the Sanctuary in accordance with these rules and regulations. The U.S. Coast Guard and the Florida Department of Natural Resources, Division of Recreation and Parks (FDNR) shall conduct surveillance and enforcement of these regulations pursuant to 14 U.S.C. 89, 16 U.S.C. 1432 (f)(4), 16 U.S.C. 7421 (b), 16 U.S.C. 3375 (a), or other appropriate legal authority.

§ 929.6 Allowed activities.

All activities except those specifically prohibited by § 929.7 or other applicable authority may be undertaken within the Sanctuary subject to the restrictions and conditions imposed by other authorities.

§ 929.7 Activities prohibited or controlled.

(a) Unless permitted by the Assistant Administrator in accordance with § 929.10, or as may be necessary for the national defense, or to respond to an emergency threatening life, property or the environment, the following activities are prohibited or controlled within the Sanctuary. All prohibitions and controls must be applied consistently with international law. Refer to § 929.9 for penalties for commission of prohibited acts.

(1) *Removal or damage of natural features, marine life and archaeological and historical resources.* (i) No person shall destroy, injure, harmfully disturb, break, cut or similarly damage or remove any coral or other marine invertebrate, or any plant, soil, rock, or other material, except that commercial taking of spiny lobster and stone crab by trap and recreational taking of spiny lobster by hand which is consistent with both the applicable regulations under the appropriate Fishery Management Plan and these regulations is allowed. Divers are prohibited from handling coral formations, standing on coral formations, or otherwise disturbing the corals.

(ii) No person shall catch or collect any tropical fish.

(iii) No person shall remove, deface, damage, or tamper with archaeological or historical resources or the cargo of any submerged wrecks or other historircal resources within the boundaries of the Sanctuary.

(iv) There shall be a rebuttable presumption that any items listed in these paragraphs found in the possession of a person within the Sanctuary have been collected or removed from within the Sanctuary.

(2) *Dredging, filling, excavating and building activities.* No person shall dredge, excavate, fill or otherwise alter the seabed in any way nor construct any structure of any kind, whether permanent or temporary, with the exception of navigation aids.

(3) *Discharges.* No person shall deposit or discharge any materials or substance of any kind into the waters

of the Sanctuary. The only exceptions are:

(i) Fish or fish parts and chumming materials;

(ii) Cooling waters from vessels; and

(iii) Effluent from marine sanitation devices approved by the United States Coast Guard.

(4) *Tampering with markers.* No person shall mark, deface or damage in any way whatsoever, or displace, remove or tamper with any signs, notices or placards, whether temporary of permanent, or with any navigational aids, monuments, stakes, posts, mooring buoys, scientific equipment or other boundary markers installed by the Sanctuary Manager, or trap floats placed for the purpose of lobster fishing.

(5) *Use of harmful fishing methods.* No person shall use within the Sanctuary, or shall carry or possess, except while passing without interruption through the Sanctuary or for law enforcement purposes, the following firearms or weapons: Pole spears, air rifles, bows and arrows, slings, Hawaiian slings, rubber powered arbaletes, pneumatic and spring loaded guns, explosive powered guns or similar devices known as spearguns. No person shall use within the Sanctuary:

(i) Wire fish traps;

(ii) Bottom trawls, dredges, fish sleds, or similar vessel-towed or anchored bottom fishing gear or net; or

(iii) Poisons, electric charges, explosives or similar devices.

(6) *Operation of watercraft and anchoring.* All watercraft shall be operated in accordance with applicable Federal rules and regulations. The following additional regulations apply within the boundaries of the Sanctuary.

(i) Watercraft shall be operated to avoid striking or otherwise causing damage to the natural features of the Sanctuary.

(ii) Watercraft must use mooring buoys, stations or anchoring arms when such facilities have been provided.

(iii) No anchor shall be cast or dragged in such a way as to damage any coral reef formations. Anchors shall be dropped only on sand flats off the reefs and be placed to avoid dragging into the coral formations.

(iv) Within 100 yards of divers, sightseeing boats or fishermen, no watercraft shall be operated at a speed greater than 4 knots or in any manner to create a wake, except by law enforcement officials while in the performance of their official duties.

(v) All watercraft from which diving operations are being conducted shall fly in a conspicuous manner the red and white "divers down" flag. Divers shall stay within 100 yards of their diving flag.

(7) *Use of dangerous weapons.* Except for law enforcement purposes, no person shall use or discharge explosives or weapons of any description within the Sanctuary boundaries. Distress signaling devices, necessary and proper for safe vessel operation, and knives generally used by fishermen and swimmers are not considered weapons for purposes of this subsection.

(b) The Sanctuary may be closed to public use in the event of emergency conditions endangering life or property. The Assistant Administrator or his/her designee may also close certain areas in order to permit recovery of the living resources from overuse, or provide for scientific research relating to protection and management. However, the total closed area shall not exceed a size necessary to accomplish these purposes. Public notice of closures will be provided through the local news media and posting of placards at the John Pennekamp Coral Reef State Park, if deemed necessary.

(c) The regulation of activities within the Sanctuary shall not prohibit any activity conducted by the Department of Defense that is essential for national defense or because of emergency. Such activities shall be conducted consistently with all regulations to the maximum extent possible.

(d) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States is signatory.

§ 929.8 Other authorities.

No license, permit or other authorization issued pursuant to any other authority may validly authorize any activity prohibited by § 929.7 unless such activity meets the criteria stated in § 929.10 (a), (c) and (d), and is specifically authorized by the Assistant Administrator.

§ 929.9 Penalties for commission of prohibited acts.

Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding *in rem* against any vessel used in violation of any such regulation. NOAA will apply the consolidated civil procedure regulations set forth at 46 FR 61643 (1981) (to be codified at 15 CFR 904.100 through 904.243), and the seizure, forfeiture, and disposal procedure regulations set forth at 46 FR 31648 (1981) (to be codified at 50 CFR Part 219) to all enforcement matters under the Act.

§ 929.10 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct in the Sanctuary activities specified in the permit including any activity specifically prohibited under § 929.7, if such activity is: (1) Research related to the resources of the Sanctuary; (2) to further the educational value of the Sanctuary; or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to the Assistant Administrator, Attn: Sanctuary Programs Division, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, DC 20235. An application shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit, the Assistant Administrator shall evaluate such matters as: (1) The general professional and financial responsibility of the applicant; (2) the appropriateness of the methods being proposed to the purpose(s) of the activity; (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, education, or scientific information; and (4) the end value of the activity.

(d) In addition to meeting the criteria in § 929.10 (a) and (c), the applicant must also satisfactorily demonstrate to the Assistant Administrator:

(1) That adequate safeguards shall be provided to protect the environment; and (2) that the environment shall be returned to the condition which existed before the activity occurred.

Permits shall be appropriately conditioned, and monitored by NOAA to ensure compliance.

(e) In considering an application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of Regional Fishery Management Councils and any other person or entity, within or outside of the Federal government, and may hold a public hearing, as he/she deems appropriate.

(f) The Assistant Administrator may grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed necessary, and may attach to any permit granted for research related to the Sanctuary stipulations requiring that: (1) The Assistant Administrator or a designated representative may observe and monitor any activity permitted by this section; (2) any information obtained in the research site shall be made available to the public; (3) periodic reports of the status of progress of such activity be submitted; and (4) the permittee shall fly the Sanctuary research flag while working in the Sanctuary.

(g) A permit granted pursuant to this section is nontransferrable.

(h) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or Permittee has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or Permittee, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141 for use through October 31, 1986)

[48 FR 55118, Dec. 9, 1983, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 929.11 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, the applicant for a permit or the Permittee, or any other interested person (hereafter Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 929.10 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator may request the appellant, and the permit applicant or permittee if other than the appellant, to submit such additional information and in such form as will allow action upon the appeal. The Administrator shall decide the appeal using the criteria set out in § 929.10 (a), (c) and (d) and any information relative to the aplication on file, any information provided by the appellant, and such other consideration as is deemed appropriate. The Administrator shall notify the appellant of the final decision and the reason(s) therefor, in writing, normally within 30 days of the date of the receipt of adequate information required to make the decision.

(c) If a hearing is requested or, if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a hearing officer designated for that purpose, after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant or permittee if different, and, other interested persons may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the interested persons of his/her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's decision shall constitute final action for the Agency for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his/her own motion or upon written request from the appellant, permit applicant or permittee, stating the reason(s) therefor.

[48 FR 55118, Dec. 9, 1983, as amended at 49 FR 1041, Jan. 6, 1984]

PART 930—FEDERAL CONSISTENCY WITH APPROVED COASTAL MANAGEMENT PROGRAMS

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AUTHORITY: Secs. 307, 316 and 317, Coastal Zone Management Act of 1972, Pub. L. 92-583, 86 Stat. 1280 (16 U.S.C. 1451 et seq.), as amended by Pub. L. 94-370, 90 Stat. 1013.

SOURCE: 44 FR 37143, June 25, 1979, unless otherwise noted.

Subpart A—Objectives

§ 930.1 Overall objectives.

The objectives of these regulations are: (a) To describe the obligations of all agencies, individuals and other parties who are required to comply with the Federal consistency provisions of the Coastal Zone Management Act;

(b) To implement the Federal consistency provisions in a manner which strikes a balance between the need to ensure consistency for Federal actions affecting the coastal zone with approved coastal management and the need to promote Federal programs;

(c) To provide flexible procedures which foster intergovernmental cooperation and minimize duplicative effort and unnecessary delay, while making certain that the objectives of the Federal consistency provisions of the Act are satisfied;

(d) To interpret significant terms in the Federal consistency provisions so that they can be uniformly understood and adhered to by all agencies, individuals and other affected parties;

(e) To provide procedures to make certain that all Federal agency and State agency consistency decisions are directly related to the objectives, policies, standards and other criteria set forth in, or referenced as part of, approved coastal management programs;

(f) To provide procedures which the Secretary, in cooperation with the Executive Office of the President, may use to mediate serious disagreements which arise between Federal and State agencies during the administration of approved coastal management programs;

(g) To provide procedures which permit the Secretary to review Federal license or permit activities, or Federal assistance activities, to determine whether they are consistent with the objectives or purposes of the Act, or are necessary in the interest of national security;

(h) To provide procedures which permit interested parties to notify the Assistant Administrator for Coastal Zone Management of Federal actions believed to be inconsistent with approved coastal management programs, or believed to have been incorrectly determined to be inconsistent with an approved management program; and

(i) To provide procedures for the reporting of any Federal actions found by the Assistant Administrator for Coastal Zone Management to be inconsistent with an approved coastal zone management program, and for the performance review of State implementation of the Federal consistency provisions.

Subpart B—General Definitions

§ 930.10 Index to definitions.

The following list includes all terms defined in Part 930 of this title keyed to the section or paragraph in which they are defined.

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Executive Office of the President	930.14
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§ 930.11 Act.

The term "Act" means the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 et seq.).

§ 930.12 Section.

The term "Section" means a section of the Coastal Zone Management Act of 1972, as amended.

§ 930.13 Secretary.

The term "Secretary" means the Secretary of the U.S. Department of Commerce.

§ 930.14 Executive Office of the President.

The term "Executive Office of the President" means the office, council, board, or other entity within the Executive Office of the President which shall participate with the Secretary in seeking to mediate serious disagreements which may arise between a Federal agency and a coastal State.

§ 930.15 OCZM.

The term "OCZM" means the Office of Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

§ 930.16 Assistant Administrator.

The term "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

§ 930.17 Federal agency.

The term "Federal agency" means any department, agency, board, commission, council, independent office or similar entity within the executive branch of the Federal government, or any wholly owned Federal government corporation.

§ 930.18 State agency.

(a) The term "State agency" means the agency of the State government designated pursuant to section 306(c)(5) of the Act to receive and administer grants for an approved coastal management program, or a single designee State agency appointed by the 306(c)(5) State agency. Any appointment by the 306(c)(5) State agency of a designee agency must be described in the State's management program. In the absence of such description, all consistency determinations, consistency certifications and Federal assistance proposals shall be sent to and reviewed by the 306(c)(5) State agency.

(b) The State agency is responsible for commenting on Federal agency consistency determinations (see Subpart C of this part), concurring with or objecting to consistency certifications for Federal licenses, permits, and Outer Continental Shelf plans (see Subparts D and E of this part), and reviewing the consistency of Federal assistance activities proposed by State or local government agencies (see Subpart F of this part). The State agency shall be responsible for securing necessary review and comment from other State, regional, or local government agencies. Thereafter, only the State agency is authorized to comment officially on a Federal consistency determination, concur with or object to a consistency certification, or determine the consistency of a proposed Federal assistance activity.

§ 930.19 Management program.

The term "management program" has the same definition as provided in section 304(11) of the Act, except that for the purposes of this part the term is limited to those management programs adopted by a coastal State in accordance with the provisions of section 306 of the Act, and approved by the Assistant Administrator.

§ 930.20 Coastal zone.

The term "coastal zone" has the same definition as provided in section 304(1) of the Act.

§ 930.21 Associated facilities.

The term "associated facilities" describes all proposed facilities:

(a) Which are specifically designed, located, constructed, operated, adapted, or otherwise used, in full or in major part, to meet the needs of a Federal action (e.g., activity, development project, license, permit, or assistance), and

(b) Without which the Federal action, as proposed, could not be conducted.

All further requirements in this part related to the review of and consistency for Federal activities including development projects (see Subpart C of this part), Federal license and permit activities (see Subparts D and E of this part) and Federal assistance activities (see Subpart F of this part) also apply to associated facilities related to those Federal actions. Therefore, the proponent of a Federal action must consider whether the Federal action and its associated facilities affect the coastal zone and, if so, whether these interrelated activities satisfy the relevant consistency requirement of the Act.

Subpart C—Consistency for Federal Activities

§ 930.30 Objectives.

The provisions of this subpart are provided to assure that all federally conducted or supported activities including development projects directly affecting the coastal zone are undertaken in a manner consistent to the maximum extent practicable with approved State coastal management programs.

§ 930.31 Federal activity.

(a) The term "Federal activity" means any functions performed by or on behalf of a Federal agency in the exercise of its statutory responsibilities.

(b) A Federal development project is a Federal activity involving the planning, construction, modification, or removal of public works, facilities, or other structures, and the acquisition, utilization, or disposal of land or water resources.

(c) The term "Federal activity" does not include the issuance of a Federal license or permit to an applicant or person (see Subparts D and E of this part) or the granting of Federal assistance to an applicant agency (see Subpart F of this part).

§ 930.32 Consistent to the maximum extent practicable.

(a) The term "consistent to the maximum extent practicable" describes the requirement for Federal activities including development projects directly affecting the coastal zone of States with approved management programs to be fully consistent with such programs unless compliance is prohibited based upon the requirements of existing law applicable to the Federal agency's operations. If a Federal agency asserts that compliance with the management program is prohibited, it must clearly describe to the State agency the statutory provisions, legislative history, or other legal authority which limits the Federal agency's discretion to comply with the provisions of the management program.

The duty the Act imposes upon Federal agencies is not set aside by virtue of section 307(e). The Act was intended to cause substantive changes in Federal agency decisionmaking within the context of the discretionary powers residing within such agencies. Accordingly, when read together, sections 307(c) (1) and (2) and 307(e) require Federal agencies, whenever legally permissible, to consider State-management programs as supplemental requirements to be adhered to in addition to existing agency mandates.

(b) A Federal agency may deviate from full consistency with an approved management program when such deviation is justified because of some unforeseen circumstances arising after the approval of the management program which present the Federal agency with a substantial obstacle that prevents complete adherence to the approved program.

§ 930.33 Identifying Federal activities directly affecting the coastal zone.

(a) Federal agencies shall determine which of their activities directly affect the coastal zone of States with approved management programs.

(b) Federal agencies shall consider all development projects within the coastal zone to be activities directly affecting the coastal zone. All other types of activities within the coastal zone are subject to Federal agency review to determine whether they directly affect the coastal zone.

(c)(1) Federal activities outside of the coastal zone, as defined in Section 304(1) of the Act, are subject to Federal agency review to determine whether they directly affect the coastal zone.

(2) OCS oil and gas lease sale activities conducted pursuant to the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*) are not Federal activities which directly affect the coastal zone within the meaning of Section 307(c)(1) of the Act, and, therefore, are not subject to review under this Subpart.

[44 FR 37143, June 25, 1979, as amended at 50 FR 35213, Aug. 30, 1985]

§ 930.34 Federal agency consistency determinations.

(a) Federal agencies shall provide State agencies with consistency determinations for all Federal activities directly affecting the coastal zone. The Federal agency may provide the State agency with this information in any manner it chooses so long as the requirements of this subpart are satisfied.

(b) Federal agencies shall provide State agencies with a consistency determination at the earliest practicable time in the planning or reassessment of the activity. A consistency determination should be prepared following development of sufficient information to determine reasonably the consistency of the activity with the State's management program, but before the Federal agency reaches a significant point of decisionmaking in its review process. The consistency determination shall be provided to State agencies at least 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to an alternative notification schedule.

§ 930.35 Federal and State agency coordination.

(a) State agencies should list in their management programs Federal activities which, in the opinion of the State agency, are likely to directly affect the coastal zone and require a Federal agency consistency determination. Listed Federal activities must be described in terms of the specific type of activity involved (e.g., Federal reclamation projects). In the event the State agency chooses to describe Federal activities outside of the coastal zone but likely to directly affect the coastal zone, it must also describe the geographic location of such activities (e.g., reclamation projects in coastal floodplains).

(b) State agencies should monitor unlisted Federal activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review, review of National Environmental Policy Act (NEPA) environmental impact statements, etc.) and should notify Federal agencies of unlisted Federal activities which Federal agencies have not subjected to a consistency review but which, in the opinion of the State agency, directly affect the coastal zone and require a Federal agency consistency determination. State agencies must notify Federal agencies within 45 days from receipt of notice of the unlisted Federal activity, otherwise the State agency waives its right to request a consistency determination. The waiver does not apply in cases where the State agency does not receive notice of the Federal activity (e.g., for those Federal activities which are not processed through Intergovernmental Review Process established pursuant to E.O. 12372, NEPA review or a similar procedure which permits State agency monitoring).

(c) The recommended listing and monitoring procedures described in paragraphs (a) and (b) of this section are neither a substitute for nor eliminate Federal agency responsibility under §§ 930.33(b) and 930.34 to provide State agencies with consistency determinations for all development projects in the coastal zone and for all other Federal activities which the Federal agency finds directly affect the coastal zone.

(d) If a Federal agency decides that a consistency determination is not required for a Federal activity (1) identified by a State agency on its list or through case-by-case monitoring, (2) which is the same as or similar to activities for which consistency determinations have been prepared in the past, or (3) for which the Federal agency undertook a thorough consistency assessment and developed initial findings on the effects of the activity on the coastal zone, the Federal agency shall provide the State agency with a notification, at the earliest practicable time in the planning of the activity, briefly setting forth the reasons for its negative determination. A negative determination shall be provided to the State agency at least 90 days before final approval of the activity, unless both the Federal agency and the State agency agree to an alternative notification schedule.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 930.36 Availability of mediation for negative determination disputes.

In the event of a serious disagreement between a Federal agency and a State agency regarding a determination related to whether a proposed activity directly affects the coastal zone, either party may seek the Secretarial mediation services provided for in Subpart G.

§ 930.37 Consistency determinations for proposed activities.

(a) Federal agencies shall review their proposed Federal activities which directly affect the coastal zone in order to develop consistency determinations which indicate whether such activities will be undertaken in a manner consistent to the maximum extent practicable with approved State management programs. Federal agencies are encouraged to consult with State agencies during their efforts to assess whether such activities will be consistent to the maximum extent practicable with such programs.

(b) In cases where Federal agencies will be performing repeated activity other than a development project (e.g., ongoing maintenance, waste disposal, etc.) which cumulatively has a direct effect upon the coastal zone, the agency may develop a general consistency determination thereby avoiding the necessity of issuing separate consistency determinations for each incremental action controlled by the major activity. A general consistency determination may only be used in situations where the incremental actions are repetitive or periodic, substantially similar in nature, and do not directly affect the coastal zone when performed separately. If a Federal agency issues a general consistency determination, it must thereafter periodically consult with the State agency to discuss the manner in which the incremental actions are being undertaken.

(c) In cases where the Federal agency has sufficient information to determine the consistency of a proposed development project from planning to completion, only one consistency determination will be required. However, in cases where major Federal decisions related to a proposed development project will be made in phases based upon developing information, with each subsequent phase subject to Federal agency discretion to implement alternative decisions based upon such information (e.g., planning, siting, and design decisions), a consistency determination will be required for each major decision. In cases of phased decisionmaking, Federal agencies shall ensure that the development project continues to be consistent to the maximum extent practicable with the State's management program.

§ 930.38 Consistency determinations for activities initiated prior to management program approval.

(a) A consistency determination will be required for ongoing Federal activities other than development projects (e.g., waste disposal practices) initiated prior to management program approval, which are governed by statutory authority under which the Federal agency retains discretion to reassess and modify the activity. In these cases the consistency determination must be made by the Federal agency at the earliest practicable time following management program approval, and the State agency must be provided with a consistency determination no later than 120 days after management program approval for ongoing activities which the State agency lists or identifies through monitoring as subject to consistency with the management program.

(b) A consistency determination shall be required for major, phased Federal development project decisions described in § 930.37(c) which are made following management program approval and are related to development projects initiated prior to program approval. In making these new decisions, Federal agencies shall consider coastal zone effects not fully evaluated at the outset of the project. This provision shall not apply to phased Federal decisions which were specifically described, considered and approved prior to management program approval (e.g., in a final environmental impact statement issued pursuant to the National Environmental Policy Act).

§ 930.39 Content of a consistency determination.

(a) The consistency determination shall include a brief statement indicating whether or not the proposed activity will be undertaken in a manner consistent to the maximum extent practicable with the management program. The statement must be based upon an evaluation of the relevant provisions of the management program. The consistency determination shall also include a detailed description of the activity, its associated facilities, and their coastal zone effects, and comprehensive data and information sufficient to support the Federal agency's consistency statement. The amount of detail in the statement evaluation, activity description and supporting information shall be commensurate with the expected effects of the activity on the coastal zone.

(b) Federal agencies shall be guided by the following in making their consistency determinations. The activity (e.g., project siting and constuction), its direct effects (e.g., air, water, waste discharges, etc.), and associated facilities (e.g., proposed siting and construction of access road, connecting pipeline, support buildings, etc.) and the direct effects of the associated facilities (e.g., erosion, wetlands, beach access impacts, etc.) must all be consistent to the maximum extent practicable with the management program. Although nonassociated facilities (e.g., recreational housing which is induced by but not necessarily related to a Federal harbor dredging project—see § 930.21) must be included within the consistency determination's description of the direct effects of the activity, Federal agencies are not responsible for evaluating the consistency of such facilities.

(c) In making their consistency determinations, Federal agencies shall give appropriate weight to the various types of provisions within the management program. Federal agencies must ensure that their activities are consistent to the maximum extent practicable with the enforceable, mandatory policies of the management program. However, Federal agencies need only give adequate consideration to management program provisions which are in the nature of recommendations. Finally, Federal agencies do not have to evaluate coastal zone effects for which the management program does not contain mandatory or recommended policies because, in the absence of such provisions, there is no basis for making a consistency determination with respect to such effects.

(d) When Federal agency standards are more restrictive than standards or requirements contained in the State's management program, the Federal agency may continue to apply its stricter standards (e.g., restrict project development or design alternatives notwithstanding permissive management program policies). In such cases the Federal agency should inform the State agency in the consistency determination of the statutory, regulatory or other basis for the application of the stricter standards.

§ 930.40 Multiple Federal agency participation.

Whenever more than one Federal agency is involved in conducting or supporting a Federal activity or its associated facilities directly affecting the coastal zone, or is involved in a group of Federal activities related to each other because of their geographic proximity, consideration should be given to the preparation of one consistency determination for all the Federal activities involved. In such cases, Federal agencies should consider joint preparation or lead agency development of the consistency determination. In either case, the consistency determination (a) must be transmitted to the State agency at least 90 days before final decisions are taken by any of the participating agencies, (b) must indicate whether or not each of the proposed activities is consistent to the maximum extent practicable with the management program, and (c) must include information on each proposed activity sufficient to support the consistency determination.

§ 930.41 State agency response.

(a) A State agency shall inform the Federal agency of its agreement or disagreement with the Federal agency's consistency determination at the earliest practicable time. If a final response has not been developed and issued within 45 days from receipt of the Federal agency notification, the State agency should at that time inform the Federal agency of the status of the matter and the basis for further delay. The Federal agency may presume State agency agreement if the State agency fails to provide a response within 45 days from receipt of the Federal agency notification.

(b) State agency agreement shall not be presumed in cases where the State agency, with the 45 day period, requests an extension of time to review the matter. Federal agencies shall approve one request for an extension period of 15 days or less. In considering whether a longer or additional extension period is appropriate, the Federal agency should consider the magnitude and complexity of the information contained in the consistency determination.

(c) Final Federal agency action may not be taken sooner than 90 days from the issuance of the consistency determination to the State agency unless both the Federal agency and the State agency agree to an alternative period (see § 930.34(b)).

§ 930.42 State agency disagreement.

(a) In the event the State agency disagrees with the Federal agency's consistency determination, the State agency shall accompany its response to the Federal agency with its reasons for the disagreement and supporting information. The State agency response must describe (1) how the proposed activity will be inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the Federal agency, would allow the activity to proceed in a manner consistent to the maximum extent practicable with the management program.

(b) If the State agency's disagreement is based upon a finding that the Federal agency has failed to supply sufficient information (see § 930.39(a)), the State agency's response must describe the nature of the information requested and the necessity of having such information to determine the consistency of the Federal activity with the management program.

(c) State agencies shall send to the Assistant Administrator a copy of responses which describe disagreements with Federal agency consistency determinations.

§ 930.43 Availability of mediation for disputes concerning proposed activities.

(a) In the event of a serious disagreement between a Federal agency and a State agency regarding the consistency of a proposed Federal activity directly affecting the coastal zone, either party may request the Secretarial mediation services provided for in Subpart G.

§ 930.44 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally approved activities in order to make certain that such activities continue to be undertaken in a manner consistent, to the maximum extent practicable, with the State's management program.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency's objection to a Federal activity which was: (1) Previously determined to be consistent to the maximum extent practicable with the State's management program, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, is no longer consistent to the maximum extent practicable with the State's management program, or (2) previously determined not to be a Federal activity directly affecting the coastal zone, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, the activity directly affects the coastal zone and is not consistent to the maximum extent practicable with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists, either party may request the Secretarial mediation services provided for in Subpart G.

Subpart D—Consistency for Activities Requiring a Federal License or Permit

§ 930.50 Objectives.

The provisions of this subpart are provided to assure that Federally licensed or permitted activities affecting the coastal zone are conducted in a manner consistent with approved management programs.

§ 930.51 Federal license or permit.

(a) The term "Federal license or permit" means any authorization, certification, approval, or other form of permission which any Federal agency is empowered to issue to an applicant.

(b) The term also includes the following types of renewals and major amendments which affect the coastal zone:

(1) Renewals and major amendments of Federal license and permit activities not previously reviewed by the State agency;

(2) Renewals and major amendments of Federal license and permit activities previously reviewed by the State agency which are filed after and are subject to management program amendments not in existence at the time of original State agency review; and

(3) Renewals and major amendments of Federal license and permit activities previously reviewed by the State agency which will cause coastal zone effects substantially different than those originally reviewed by the State agency.

§ 930.52 Applicant.

The term "applicant" means any individual, public or private corporation, partnership, association, or other entity organized or existing under the laws of any State, or any State, regional, or local government, who, following management program approval, files an application for a Federal license or permit to conduct an activity affecting the coastal zone. The term "applicant" does not include Federal agencies applying for Federal licenses or permits. Federal agency "activities" requiring Federal licenses or permits are subject to the consistency requirements of Subpart C of this part.

§ 930.53 Management program license and permit listing.

(a) During management program development, Federal agencies should assist State agencies in identifying Federal license and permit activities which reasonably can be expected to affect the coastal zone.

(b) State agencies shall develop a list of Federal license and permit activities which are likely to affect the coastal zone and which the State agency wishes to review for consistency with the management program. The list shall be included as part of the management program, and the Federal license and permit activities shall be described in terms of the specific licenses or permits involved (e.g., Corps of Engineers 404 permits, Coast Guard bridge permits, etc.). In the event the State agency chooses to review Federal licenses and permits for activities outside of the coastal zone but likely to affect the coastal zone, it must generally describe the geographic location of such activities.

(c) If a State agency wishes to avoid repeated review of minor Federally permitted activities which, while individually inconsequential, cumulatively cause effects on the coastal zone, the State agency, after developing conditions allowing concurrence for such activities, may issue a general public notice (see § 930.61) and general concurrence allowing similar minor work in the same geographic area to proceed without prior State agency review. In such cases, the State agency must set forth in the management program license and permit list the minor Federal license and permit activities and the relevent conditions which are covered by the general concurrence. Minor Federal license or permit activities which satisfy the conditions of the general concurrence are not subject to the consistency certification requirement of this subpart. Except in cases where the State agency indicates otherwise, copies of Federal license or permit applications for activities subject to a general concurrence must be sent by the applicant to the State agency to allow the State agency to monitor adherence to the conditions required by such concurrence. Confidential and proprietary material within such applications may be deleted.

(d) The license and permit list may be amended by the State agency following consultation with the affected Federal agency and approval of additions or deletions by the Assistant Administrator. The State agency shall provide copies of the list and any amendments to Federal agencies and shall make the information available to the public.

(e) No Federal license or permit described on an approved list shall be issued by a Federal agency until the requirements of this subpart have been satisfied. Federal agencies shall inform applicants for listed licenses and permits of the requirements of this subpart.

§ 930.54 Unlisted Federal license and permit activities.

(a) With the assistance of Federal agencies, State agencies should monitor unlisted Federal license and permit activities (e.g., by use of intergovernmental review process established pursuant to E.O. 12372, review of NEPA environmental impact statements, etc.) and shall immediately notify Federal agencies and applicants of unlisted activities affecting the coastal zone which require State agency review. State agencies must inform the Federal agency and applicant within 30 days from notice of the license or permit application, otherwise the State agency waives its right to review the unlisted activity. The waiver does not apply in cases where the State agency does not receive notice of the Federal license or permit activity.

(b) The State agency must also notify the Assistant Administrator of unlisted Federal license or permit activities which the State agency believes should be subject to State agency review. Following State agency notification to the Federal agency, applicant and the Assistant Administrator, the Federal agency may not issue the license or permit until the requirements of this subpart have been satisfied, unless the Assistant Administrator disapproves the State agency decision to review the activity.

(c) The Federal agency and the applicant have 15 days from receipt of the State agency notice to provide comments to the Assistant Administrator regarding the State agency's decision to review the activity. The sole basis for the Assistant Administrator's approval or disapproval of the State agency's decision will relate to whether the proposed activity can be reasonably expected to affect the coastal zone of the State. The Assistant Administrator shall issue a decision, with supporting comments, to the State agency, Federal agency and applicant within 30 days from receipt of the State agency notice.

(d) In the event of disapproval by the Assistant Administrator, the Federal agency may approve the license or permit application and the applicant need not comply with the requirements of this subpart. If the Assistant Administrator approves the State agency's decision, the Federal agency and applicant must comply with the consistency certification procedures of this subpart.

(e) Following an approval by the Assistant Administrator, the applicant shall amend the Federal application by including a consistency certification and shall provide the State agency with a copy of the certification along with necessary supporting data and information (see §§ 930.63 and 930.64). For the purposes of this section, concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection within six months from the original Federal agency notice to the State agency (see paragraph (a) of this section) or within three months from receipt of the applicant's consistency certification and accompanying information, whichever period terminates last.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 930.55 Availability of mediation for license or permit disputes.

In the event of a serious disagreement between a Federal and State agency regarding whether a listed or unlisted Federal license or permit activity is subject to consistency review, either party may request the Secretarial mediation services provided for in Subpart G; notice shall be provided to the applicant. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding approval of a license or permit application for an activity on an approved management program list (see § 930.53) or individually approved by the Assistant Administrator (see § 930.54) pending satisfaction of the requirements of this subpart. Similarly, the existence of a serious disagreement will not prevent the Federal agency from approving a license or permit activity which has not received Assistant Administrator approval.

§ 930.56 State agency guidance and assistance to applicants; information requirements.

(a) As a preliminary matter, any applicant for a Federal license or permit selected for review by a State agency should obtain the views and assistance of that agency regarding the means for ensuring that the proposed activity will be conducted in a manner consistent with the State's management program. As part of its assistance efforts, the State agency shall make available for public inspection copies of the management program document.

(b) The management program as originally approved or amended may describe requirements regarding the data and information necessary to assess the consistency of Federal license and permit activities. Required data and information may not include confidential and proprietary material. In the case of approved amendments, State agencies shall send copies to relevant Federal agencies who shall, in turn, provide the information requirements to applicants. If a State does not choose to develop or amend its management program to include information requirements, the applicant must, at a minimum, supply the State agency with the information required by § 930.58.

§ 930.57 Consistency certifications.

(a) When satisfied that the proposed activity meets the Federal Consistency requirements of this subpart, all applicants for Federal licenses or permits subject to State agency review shall provide in the application to the Federal licensing or permitting agency a certification that the proposed activity complies with and will be conducted in a manner consistent with the State's approved management program. At the same time, the applicant shall furnish to the State agency a copy of the certification.

(b) The applicant's consistency certification shall be in the following form: "The proposed activity complies with (name of State) approved coastal management program and will be conducted in a manner consistent with such program."

§ 930.58 Necessary data and information.

(a) The applicant shall furnish the State agency with necessary data and information along with the consistency certification. Such information and data shall include the following:

(1) A detailed description of the proposed activity and its associated facilities which is adequate to permit an assessment of their probable coastal zone effects. Maps, diagrams, technical data and other relevant material must be submitted when a written description alone will not adequately describe the proposal (a copy of the Federal application and all supporting material provided to the Federal agency should also be submitted to the State agency).

(2) Information required by the State agency pursuant to § 930.56(b).

(3) A brief assessment relating the probable coastal zone effects of the proposal and its associated facilities to the relevant elements of the management program.

(4) A brief set of findings, derived from the assessment, indicating that the proposed activity (e.g., project siting and construction), its associated facilities (e.g., access road, support buildings), and their effects (e.g., air, water, waste discharges, erosion, wetlands, beach access impacts) are all consistent with the provisions of the management program. In developing findings, the applicant shall give appropriate weight to the various types of provisions within the management program. While applicants must be consistent with the enforceable, mandatory policies of the management program, they need only demonstrate adequate consideration of policies which are in the nature of recommendations. Applicants need not make findings with respect to coastal zone effects for which the management program does not contain mandatory or recommended policies.

(b) At the request of the applicant, interested parties who have access to information and data required by subparagraphs (a) (1) and (2) of this section may provide the State agency with all or part of the material required. Furthermore, upon request by the applicant, the State agency shall provide assistance for developing the assessment and findings required by paragraphs (a) (3) and (4) of this section.

(c) When satisfied that adequate protection against public disclosure exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposal.

§ 930.59 Multiple permit review.

(a) Applicants shall, to the extent practicable, consolidate related Federal license and permit activities affecting the coastal zone for State agency review. State agencies shall, to the extent practicable, provide applicants with a "one-stop" multiple permit review for consolidated permits to minimize duplication of effort and to avoid unnecessary delays.

(b) A State agency objection to one or more of the license or permit activities submitted for consolidated review shall not prevent the applicant from receiving Federal agency approval for those license and permit activities found to be consistent with the management program.

§ 930.60 Commencement of State agency review.

(a) Except as provided in § 930.54(e), State agency review of an applicant's consistency certification begins at the time the State agency receives a copy of the consistency certification, and the information and data required pursuant to § 930.58.

(b) A State agency request for information or data in addition to that required by § 930.58 shall not extend the date of commencement of State agency review.

§ 930.61 Public notice.

(a) Following receipt of the material described in § 930.60 the State agency shall ensure timely public notice of the proposed activity. At a minimum the provision of public notice must be in accordance with State law. In addition, public notice must be provided in the immediate area of the coastal zone which is likely to be affected by the proposed activity. Public notice shall be expanded in proportion to the degree of likely public interest resulting from the unique geographic area involved, the substantial commitment of or impact on coastal resources, the complexity or controversy of the proposal, or for other good cause.

(b) Public notice shall facilitate public comment by providing a summary of the proposed activity, by announcing the availability for inspection of the consistency certification and accompanying public information and data, and by requesting that comments be submitted to the State agency.

(c) A number of procedural options, if permitted by State law, are available to State agencies to satisfy the public notice requirements of this subpart. They include, but are not limited to:

(1) The State agency providing the public notice;

(2) The State agency requiring the applicant to provide the public notice; or

(3) The State agency relying upon the public notice provided by the Federal agency reviewing the application for the Federal license or permit (e.g., notice of availability of NEPA environmental impact statements) if such notice satisfies the minimum requirements set forth in paragraphs (a) and (b) of this section.

(d) Federal and State agencies are encouraged to issue joint public notices whenever possible to minimize duplication of effort and to avoid unnecessary delays.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29136, June 24, 1983]

§ 930.62 Public hearings.

(a) At the discretion of the State agency, public notice may include the announcement of one or more public hearings. Public hearings shall be scheduled with a view towards (1) allowing access to the consistency certification and accompanying public information within a reasonable time prior to the hearing, (2) facilitating broad public attendance and participation at the hearing, and (3) affording the applicant expeditious consideration of the proposed activity.

(b) Federal and State agencies are encouraged to hold joint public hearings in the event both agencies determine that a hearing on the action is necessary.

§ 930.63 State agency concurrence with a consistency certification.

(a) At the earliest practicable time, the State agency shall notify the Federal agency and the applicant whether the State agency concurs with or objects to a consistency certification. Concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection within six months following commencement of State agency review.

(b) State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to inform the public, obtain sufficient comment, and develop a reasonable decision on the matter. If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the applicant and the Federal agency of the status of the matter and the basis for further delay.

(c) If the State agency issues a concurrence or is conclusively presumed to concur with the applicant's consistency certification, the Federal agency may approve the Federal license or permit application. Notwithstanding State agency concurrence with a consistency certification, the Federal permitting agency may deny approval of the Federal license or permit application. Federal agencies should not delay processing applications pending receipt of a State agency's concurrence. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant and the State agency.

§ 930.64 State agency objection to a consistency certification.

(a) If the State agency objects to the applicant's consistency certification within six months following commencement of review, it shall notify the applicant, Federal agency and Assistant Administrator of the objection.

(b) State agency objections must describe (1) how the proposed activity is inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the applicant, would permit the proposed activity to be conducted in a manner consistent with the management program.

(c) During the period when the State agency is reviewing the consistency certification, the applicant and the State agency should attempt to agree upon conditions, which, if met by the applicant, would permit State agency concurrence. The parties shall also consult with the Federal agency responsible for approving the Federal license or permit to ensure that proposed conditions satisfy Federal as well as State management program requirements.

(d) A State agency objection may be based upon a determination that the applicant has failed, following a written State agency request, to supply the information required pursuant to § 903.58. If the State agency objects on the grounds of insufficient information, the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program.

(e) A State agency objection shall include a statement informing the applicant of a right of appeal to the Secretary on the grounds described in Subpart H.

§ 930.65 Federal permitting agency responsibility.

Following receipt of a State agency objection to a consistency certification, the Federal agency shall not issue the Federal license or permit except as provided in Subpart H of this part.

§ 930.66 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally licensed and permitted activities in order to make certain that such activities continue to conform to both Federal and State requirements.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency objection to a Federally licensed or permitted activity which was: (1) Previously determined to be consistent with the State's management program, but which the State agency later maintains is being conducted or is having coastal zone effects substantially different than originally proposed and, as a result, is no longer consistent with the State's management program; or (2) previously determined not to be an activity affecting the coastal zone, but which the State agency later maintains is being conducted or is having coastal effects substantially different than originally proposed and, as a result, the activity affects the coastal zone in a manner inconsistent with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action; a copy of the request must be sent to the applicant.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists with the Federal agency, either party may seek the Secretarial mediation services provided for in Subpart G of this part.

Subpart E—Consistency for Outer Continental Shelf (OCS) Exploration, Development and Production Activities

§ 930.70 Objectives.

The provisions of this subpart are provided to assure that all Federal license and permit activities described in detail in OCS plans and which affect the coastal zone are conducted in a manner consistent with approved coastal zone management programs.

§ 930.71 Federal license or permit activity described in detail.

The term "Federal license or permit activity described in detail" means any activity requiring a Federal license or permit, as defined in § 930.51, which the Secretary of the Interior determines must be described in detail within an OCS plan.

§ 930.72 Person.

The term "person" means any individual, corporation, partnership, association, or other entity organized or existing under the laws of any State, the Federal government, any State, regional, or local government, or any entity of such Federal, State, regional or local government, who submits to the Secretary of the Interior, or designee following management program approval, an OCS plan which describes in detail Federal license or permit activities.

§ 930.73 OCS plan.

(a) The term "OCS plan" means any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.), and the regulations under that Act, which is submitted to the Secretary of the Interior or designee following management program approval and which describes in detail Federal license or permit activities.

(b) The requirements of this subpart do not apply to Federal license and permit applications filed after management program approval for activities described in detail in OCS plans approved by the Secretary of the Interior or designee prior to management program approval.

§ 930.74 OCS activities subject to State agency review.

Except for States which do not anticipate coastal zone effects resulting from OCS activities, management program lists required pursuant to § 930.53 shall include a reference to OCS plans which describe in detail Federal license and permit activities affecting the coastal zone.

§ 930.75 State agency assistance to persons; information requirements.

(a) As a preliminary matter, any person intending to submit to the Secretary of the Interior and OCS plan which describes in detail Federal license or permit activities affecting the coastal zone should obtain the views and assistance of the State agency regarding the means for ensuring that such activities will be conducted in a manner consistent with the State's management program. As part of its assistance efforts, the State agency shall make available for inspection copies of the management program document.

(b) In accordance with the provisions in § 930.56(b), the management program as originally approved or amended may describe requirements regarding data and information which will be necessary for the State agency to assess the consistency of the Federal license and permit activities described in detail in OCS plans.

§ 930.76 Submission of an OCS plan and consistency certification.

Any person submitting to the Secretary of the Interior or designee any OCS plan shall:

(a) Identify all activities described in detail in the plan which are subject to State agency review;

(b) When satisfied that the proposed activities meet the Federal consistency requirements of this subpart, provide the Secretary of the Interior or designee with a consistency certification, attached to the OCS plan, and the Secretary of the Interior or designee shall furnish the State agency a copy of the OCS plan (excluding proprietary information) and consistency certification.

(c) The person's consistency certification shall be in the following form:

The proposed activities described in detail in this plan comply with (name of State(s)) approved coastal management program(s) and will be conducted in a manner consistent with such program(s).

§ 930.77 Necessary data and information.

(a) The State agency shall use the information received pursuant to the Department of the Interior's operating regulations governing exploration, development and production operations on the OCS (see 30 CFR 250.34) and regulations pertaining to the OCS information program (see 30 CFR Part 252) to determine the consistency of proposed Federal license and permit activities described in detail in OCS plans.

(b) The person shall supplement the information provided by paragraph (a) of this section by supplying the State agency with:

(1) Information required by the State agency pursuant to § 930.75(b).

(2) A brief assessment relating the probable coastal zone effects of the activities and their associated facilities to the relevant elements of the management program, and

(3) A brief set of findings, derived from the assessment, indicating that each of the proposed activities (e.g., drilling, platform placement) and their associated facilities (e.g., onshore support structures, offshore pipelines), and their effects (e.g., air, water, waste discharge, erosion, wetlands, beach access impacts) are all consistent with the provisions of the management program. In developing findings, the person shall give appropriate weight to the various provisions within the management program in accordance with the guidance provided in § 930.58(a)(4).

(c) At the request of the person, interested parties who have access to information required by paragraphs (a) and (b)(1) of this section may provide the State agency with all or part of the material required. Furthermore, upon request by the person, the State agency shall provide assistance for developing the assessment and findings required by paragraphs (b) (2) and (3) of this section.

(d) When satisfied that adequate protection against public disclosure exists, persons should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposed activities. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposed activities.

§ 930.78 Commencement of State agency review; public notice.

(a) State agency review of the person's consistency certification begins at the time the State agency receives a copy of the OCS plan, consistency certification, and required necessary data and information. A State agency request for information and data in addition to that required by § 930.77 shall not extend the date of commencement of State agency review.

(b) Following receipt of the material described in paragraph (a) of this section, the State agency shall ensure timely public notice of the proposed activities in accordance with the directives within §§ 930.61 through 930.62.

§ 930.79 State agency concurrence or objection.

(a) At the earliest practicable time, the State agency shall notify the person, the Secretary of the Interior or designee and the Assistant Administrator of its concurrence with or objection to the consistency certification. State agencies should restrict the period of public notice, receipt of comments, hearing proceedings and final decision-making to the minimum time necessary to inform the public, obtain sufficient comment, and develop a reasonable decision on the matter. If the State agency has not issued a decision within three months following commencement of State agency review, it shall notify the person, the Secretary of the Interior or designee and the Assistant Administrator of the status of review and the basis for further delay in issuing a final decision. Notice shall be in written form and postmarked no later than three months following the State agency's receipt of the certification and supporting information. Concurrence by the State agency shall be conclusively presumed if the notification required by this subparagraph is not provided.

(b) Concurrence by the State agency shall be conclusively presumed in the absence of a State agency objection to the consistency certification within six months following commencement of State agency review.

(c) If the State agency objects to one or more of the Federal license or permit activities described in detail in the OCS plan, it must provide a separate discussion for each objection in accordance with the directives within § 930.64 (b) and (d). The objection shall also include a statement informing the person of a right of appeal to the Secretary on the grounds described in Subpart H.

§ 930.80 Effect of State agency concurrence.

(a) If the State agency issues a concurrence or is conclusively presumed to concur with the person's consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time Federal applications are actually filed for the Federal licenses and permits to which such concurrence applies.

(b) Unless the State agency indicate otherwise, copies of Federal license and permit applications for activitie described in detail in an OCS plan which has received State agency concurrence shall be sent by the person t the State agency to allow the State agency to monitor the activities. Confidential and proprietary materia within such applications may be deleted.

§ 930.81 Federal permitting agency responsibility.

Following receipt of a State agenc objection to a consistency certificatio related to Federal license or permit activities described in detail in an OC plan, the Federal agency shall no issue any of such licenses or permit except as provided in Subpart H o this part.

§ 930.82 Multiple permit review.

(a) A person submitting a consistency certification for Federal license o permit activities described in detail i an OCS plan is strongly encouraged t work with other Federal agencies i an effort to include, for consolidate State agency review, consistency certifications and supporting data and information applicable to OCS-relate Federal license and permit activitie affecting the coastal zone which ar not required to be described in detai in OCS plans but which are subjecte to State agency consistency revie (e.g., Corps of Engineer permits fo the placement of structures on th OCS and for dredging and the transportation of dredged material, Environmental Protection Agency air an water quality permits for offshore operations and onshore support an processing facilities, etc.). In the even the person does not consolidate suc OCS-related permit activities with th State agency's review of the OCS plan such activities will remain subject t individual State agency review unde the requirements of Subpart D of this part.

(b) A State agency objection to one or more of the OCS-related Federal license or permit activities submitted for consolidated review shall not prevent the person from receiving Federal agency approval (1) for those OCS-related license or permit activities found by the State agency to be consistent with the management program, and (2) for the license and permit activities described in detail in the OCS plan provided the State agency concurs with the consistency certification for such plan. Similarly, a State agency objection to the consistency certification for an OCS plan shall not prevent the person from receiving Federal agency approval for those OCS-related license or permit activities determined by the State agency to be consistent with the management program.

§ 930.83 Amended or new OCS plans.

If the State agency objects to the person's OCS plan consistency certification, and if, pursuant to Subpart H, the Secretary does not determine that each of the objected to Federal license or permit activities described in detail in such plan is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the person shall submit an amended or new plan to the Secretary of the Interior or designee and to the State agency along with a consistency certification and data and information necessary to support the new consistency determination. The data and information shall specifically describe modifications made to the original OCS plan, and the manner in which such modifications will ensure that all of the proposed Federal license or permit activities described in detail in the amended or new plan will be conducted in a manner consistent with the State's management program.

§ 930.84 Review of amended or new OCS plans; public notice.

(a) After receipt of a copy of the amended or new OCS plan, consistency certification, and accompanying data and information, State agency review shall begin.

(b) Following receipt of the material described in paragraph (a) of this section, the State agency shall ensure timely public notice of the proposed activities in accordance with the directives within §§ 930.61 through 930.62.

(c) The State agency shall concur with or object to the person's consistency certification in accordance with the directives within § 930.79, except that the applicable time period for purposes of concurrence by conclusive presumption shall be three months instead of six months.

(d) If the State agency issues a concurrence or is conclusively presumed to concur with the person's new consistency certification, the person will not be required to submit additional consistency certifications and supporting information for State agency review at the time Federal applications are actually filed for the Federal licenses and permits to which such concurrence applies.

(e) Unless the State agency indicates otherwise, copies of Federal license and permit applications for activities described in detail in an amended or new OCS plan which has received State agency concurrence shall be sent by the person to the State agency to allow the State agency to monitor the activities. Confidential and proprietary material within such applications may be deleted.

§ 930.85 Continuing State agency objections.

If the State agency objects to the consistency certification for an amended or new OCS plan, the prohibition in § 930.81 against Federal agency approval of licenses or permits for activities described in detail in such a plan applies, further Secretarial review pursuant to Subpart H may take place, and the development of an additional amended or new OCS plan and consistency certification may be required pursuant to §§ 930.83 through 930.84.

§ 930.86 Failure to comply substantially with an approved OCS plan.

(a) The Department of the Interior and State agencies shall cooperate in their efforts to monitor Federally licensed and permitted activities described in detail OCS plans to make certain that such activities continue to conform to both Federal and State requirements.

(b) If a State agency claims that a person is failing substantially to comply with an approved OCS plan subject to the requirements of this Subpart, and such failure allegedly involves the conduct of activities affecting the coastal zone in a manner that is not consistent with the approved management program, the State agency shall transmit its claim to the U.S. Geological Survey supervisor for the area involved. Such claim shall include: (1) A description of the specific activity involved and the alleged lack of compliance with the OCS plan, and (2) a request for appropriate remedial action. A copy of the claim shall be sent to the person and the Assistant Administrator.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that the person is failing to comply substantially with the OCS plan, the governor or section 306(c)(5) State agency (see § 930.18) may file a written objection with the Secretary. If the Secretary finds that the person is failing to comply substantially with the OCS plan, the person shall submit an amended or new OCS plan along with a consistency certification and supporting information to the Secretary of the Interior or designee and to the State agency. Following such a finding by the Secretary, the person shall comply with the originally approved OCS plan, or with interim orders issued jointly by the Secretary and the U.S. Geological Survey, pending approval of the amended or new OCS plan. The directives within §§ 930.83 through 930.85 shall apply to further State agency review of the consistency certification for the amended or new plan.

(d) A person shall be found to have failed substantially to comply with an approved OCS plan if the State agency claims and the Secretary finds that one or more of the activities described in detail in the OCS plan which affects the coastal zone are being conducted or are having a coastal zone effect substantially different than originally described by the person in the plan or accompanying information and, as a result, the activities are no longer being conducted in a manner consistent with the State's management program. The Secretary may make a finding that a person has failed substantially to comply with an approved OCS plan only after providing a reasonable opportunity for the person and the Secretary of the Interior to review the State agency's objection and to submit comments for the Secretary's consideration.

Subpart F—Consistency for Federal Assistance to State and Local Governments

§ 930.90 Objectives.

The provisions of this subpart are provided to assure that Federal assistance to State and local governments for activities affecting the coastal zone is granted only when such activities are consistent with approved coastal zone managements programs.

§ 930.91 Federal assistance.

The term "Federal assistance" means assistance provided under a Federal program to an applicant agency through grant or contractual arrangements, loans, subsidies, guarantees, insurance, or other form of financial aid.

§ 930.92 Applicant agency.

The term "applicant agency" means any unit of State or local government, or any related public entity such as a special purpose district, which, following management program approval, submits an application for Federal assistance.

§ 930.93 Intergovernmental review process.

The term "intergovernmental review process" describes the procedures established by states pursuant to E.O. 12372, "Intergovernmental Review of Federal Programs," and implementing regulations of the review of Federal financial assistance to states and local governments.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[48 FR 29136, June 24, 1983]

§ 930.94 State intergovernmental review process for consistency.

The process by which states with approved coastal management programs may review applications from state agencies and local governments for Federal assistance should be developed by each state in accordance with Executive Order 12372 and implementing regulations. In accordance with the Executive Order and regulations, states may use this process to review such applications for consistency with their approved coastal management programs.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[48 FR 29137, June 24, 1983]

§ 930.95 Guidance provided by the State agency.

(a) State agencies should include within the management program a listing of specific types of Federal assistance programs subject to a consistency review. Such a listing, and any amendments, will require prior 306(c)(5) state agency (see § 930.18) consultation with affected Federal agencies and approval by the Assistant Administrator.

(b) In the event the State agency chooses to review applications for Federal assistance activities outside of the coastal zone but likely to affect the coastal zone, the State agency must develop a Federal assistance provision within the management program generally describing the geographic area (e.g. coastal floodplains) within which Federal assistance activities will be subject to review. This provision, and any refinements, will require prior 306(c)(5) State agency consultation with affected Federal agencies and approval by the Assistant Administrator.

(c) The State agency shall provide copies of any Federal assistance list or geographic provision, and any refinements, to Federal agencies, units of State or local government empowered to undertake Federally assisted activities within the coastal zone or described geographic area.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979. Redesignated and amended at 48 FR 29136, June 24, 1983]

§ 930.96 Consistency review.

(a) If pursuant to the intergovernmental review process, the State agency does not object to the proposed activity, the Federal agency may grant the Federal assistance to the applicant agency. Notwithstanding State agency consistency approval for the proposed project, the Federal agency may deny assistance to the applicant agency. Federal agencies should not delay processing applications pending receipt of a State agency approval or objection. In the event a Federal agency determines that an application will not be approved, it shall immediately notify the applicant agency and the State agency.

(b) If pursuant to the intergovernmental review process, the State agency objects to the proposed project, the state agency shall notify the applicant agency, Federal agency and the Assistant Administrator of the objection.

(c) State agency objections must describe: (1) How the proposed project is inconsistent with specific elements of the management program, and (2) alternative measures (if they exist) which, if adopted by the applicant agency, would permit the proposed project to be conducted in a manner consistent with the management program.

(d) A State agency objection may be based upon a determination that the applicant agency has failed, following a written State agency request, to supply necessary information. If the State agency objects on the grounds of insufficient information, the objection must describe the nature of the information requested and the necessity of having such information to determine the consistency of the activity with the management program.

(e) State agency objections shall include a statement informing the applicant agency of a right of appeal to the Secretary on the grounds described in Subpart H of this part.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29137, June 24, 1983]

§ 930.97 Federal assisting agency responsibility.

Following receipt of a State agency objection, the Federal agency shall not approve assistance for the activity except as provided in Subpart H of this part.

§ 930.98 Federally assisted activities outside of the coastal zone or the described geographic area.

(a) State agencies should monitor proposed Federal assistance activities outside of the coastal zone or the described geographic area (e.g., by use of the intergovernmental review process, review of NEPA environmental impact statements, etc.) and shall immediately notify applicant agencies, Federal agencies, and any other agency or office which may be identified by the state in its intergovernmental review process pursuant to E.O. 12372 of proposed activities which can reasonably be expected to affect the coastal zone and which the State agency is reviewing for consistency with the management program. Notification shall also be sent by the State agency to the Assistant Administrator. State agencies must inform the parties of objections within the time period permitted under the intergovernmental review process, otherwise the State agency waives its right to object to the proposed activity.

(b) If within the permitted time period the State agency notifies the Federal agency of its objection to a proposed Federally assisted activity, the Federal agency shall not provide assistance to the applicant agency except as provided in Subpart H, unless the Assistant Administrator disapproves the State agency's decision to review the activity. The Assistant Administrator shall be guided by the provisions in § 930.54 (c) and (d).

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 37143, June 25, 1979, as amended at 48 FR 29137, June 24, 1983]

§ 930.99 Availability of mediation for Federal assistance disputes.

In the event of a serious disagreement between a Federal and State agency regarding whether a Federal assistance activity is subject to consistency review, either party may request the Secretarial mediation services provided for in Subpart G of this part. The existence of a serious disagreement will not relieve the Federal agency from the responsibility for withholding Federal assistance for the activity pending satisfaction of the requirements of this subpart, except in cases where the Assistant Administrator has disapproved a State agency decision to review an activity.

§ 930.100 Availability of mediation for previously reviewed activities.

(a) Federal and State agencies shall cooperate in their efforts to monitor Federally assisted activities in order to make certain that such activities continue to conform to both Federal and State requirements.

(b) The State agency shall request that the Federal agency take appropriate remedial action following a serious disagreement resulting from a State agency objection to a Federally assisted activity which was: (1) Previously determined to be consistent with the State's management program, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result, is no longer consistent with the State management program, or (2) previously determined not to be a project affecting the coastal zone, but which the State agency later maintains is being conducted or is having a coastal zone effect substantially different than originally proposed and, as a result the project affects the coastal zone in a manner inconsistent with the State's management program. The State agency's request must include supporting information and a proposal for recommended remedial action; a copy of the request must be sent to the applicant agency.

(c) If, after a reasonable time following a request for remedial action, the State agency still maintains that a serious disagreement exists with the Federal agency, either party may seek the Secretarial mediation services provided for in Subpart G of this part.

Subpart G—Secretarial Mediation

§ 930.110 Objectives.

The purpose of this subpart is to describe mediation procedures which Federal and State agencies may use to attempt to resolve serious disagreements which arise during the administration of approved management programs.

§ 930.111 Informal negotiations.

The availability of mediation does not preclude use by the parties of alternative means for resolving their disagreement. In the event a serious disagreement arises, the parties are strongly encouraged to make every effort to resolve the disagreement informally. OCZM shall be available to assist the parties in these efforts.

§ 930.112 Request for mediation.

(a) The Secretary or other head of a Federal agency, or the Governor or the section 306(c)(5) State agency (see § 930.18), may notify the Secretary in writing of the existence of a serious disagreement, and may request that the Secretary seek to mediate the serious disagreement. A copy of the written request must be sent to the agency with which the requesting agency disagrees, and to the Assistant Administrator.

(b) Within 15 days following receipt of a request for mediation the disagreeing agency shall transmit a written response to the Secretary, and to the agency requesting mediation, indicating whether it wishes to participate in the mediation process. If the disagreeing agency declines the offer to enter into mediation efforts, it must indicate the basis for its refusal in its response. Upon receipt of a refusal to participate in mediation efforts, the Secretary shall seek to persuade the disagreeing agency to reconsider its decision and enter into mediation efforts. If the disagreeing agencies do not all agree to participate, the Secretary will cease efforts to provide mediation assistance.

§ 930.113 Public hearings.

(a) If the parties agree to the mediation process, the Secretary shall appoint a hearing officer who shall schedule a hearing in the local area concerned. The hearing officer shall give the parties at least 30 days notice of the time and place set for the hearing and shall provide timely public notice of the hearing.

(b) At the time public notice is provided, the Federal and State agencies shall provide the public with convenient access to public data and information related to the serious disagreement.

(c) Hearings shall be informal and shall be conducted by the hearing officer with the objective of securing in a timely fashion information related to the disagreement. The Federal and State agencies, as well as other interested parties, may offer information at the hearing subject to the hearing officer's supervision as to the extent and manner of presentation. Unduly repetitious oral presentation may be excluded at the discretion of the hearing officer; in the event of such exclusion the party may provide the hearing officer with a written submission of the proposed oral presentation. Hearings will be recorded and the hearing officer shall provide transcripts and copies of written information offered at the hearing to the Federal and State agency parties. The public may inspect and copy the transcripts and written information provided to these agencies.

§ 930.114 Secretarial mediation efforts.

(a) Following the close of the hearing, the hearing officer shall transmit the hearing record to the Secretary. Upon receipt of the hearing record, the Secretary shall schedule a mediation conference to be attended by representatives from the Office of the Secretary, the disagreeing Federal and State agencies, and any other interested parties whose participation is deemed necessary by the Secretary. The Secretary shall provide the parties at least 10 days notice of the time and place set for the mediation conference.

(b) Secretarial mediation efforts shall last only so long as the Federal and State agencies agree to participate. The Secretary shall confer with the Executive Office of the President, as necessary, during the mediation process.

§ 930.115 Termination of mediation.

Mediation shall terminate (a) at any time the Federal and State agencies agree to a resolution of the serious disagreement, (b) if one of the agencies withdraws from mediation, (c) in the event the agencies fail to reach a resolution of the serious disagreement within 15 days following Secretarial conference efforts, and the agencies do not agree to extend mediation beyond that period, or (d) for other good cause.

§ 930.116 Judicial review.

The availability of the mediation services provided in this subpart is not intended expressly or implicitly to limit the parties' use of alternate forums to resolve disputes. Specifically, judicial review where otherwise available by law may be sought by any party to a serious disagreement without first having exhausted the mediation process provided for in this subpart.

Subpart H—Secretarial Review Related to the Objectives or Purposes of the Act and National Security Interests

§ 930.120 Objectives.

The provisions of this subpart provide procedures by which the Secretary may find that a Federal license or permit activity, including those described in detail in an OCS plan, or a Federal assistance activity, which is inconsistent with a management program, may be federally approved because the activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security.

§ 930.121 Consistent with the objectives or purposes of the Act.

The term "consistent with the objectives or purposes of the Act" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because it satisfies the following four requirements:

(a) The activity furthers one or more of the competing national objectives or purposes contained in section 302 or 303 of the Act,

(b) When performed separately or when its cumulative effects are considered, it will not cause adverse effects on the natural resources of the coastal zone substantial enough to outweigh its contribution to the national interest,

(c) The activity will not violate any requirements of the Clean Air Act, as amended, or the Federal Water Pollution Control Act, as amended, and

(d) There is no reasonable alternative available (e.g., location design, etc.) which would permit the activity to be conducted in a manner consistent with the management program.

§ 930.122 Necessary in the interest of national security.

The term "necessary in the interest of national security" describes a Federal license or permit activity, or a Federal assistance activity which, although inconsistent with a State's management program, is found by the Secretary to be permissible because a national defense or other national security interest would be significantly impaired if the activity were not permitted to go forward as proposed. Secretarial review of national security issues shall be aided by information submitted by the Department of Defense or other interested Federal agencies. The views of such agencies, while not binding, shall be given considerable weight by the Secretary. The Secretary will seek information to determine whether the objected-to activity directly supports national defense or other essential national security objectives.

§ 930.123 Appellant.

The term "appellant" refers to an applicant, person or applicant agency submitting an appeal to the Secretary pursuant to the provisions of this subpart.

§ 930.124 Informal discussions.

In the event the State agency informs the applicant, person or applicant agency that it intends to object to the proposed activity, the parties should consult informally to attempt to resolve the matter in a manner which avoids the necessity of appealing the issue to the Secretary. OCZM shall be available to assist the parties in these discussions.

§ 930.125 Appeals to the Secretary.

(a) An appellant may file a notice of appeal with the Secretary with 30 days of the appellant's receipt of a State agency objection. The notice of appeal shall be accompanied by a statement in support of the appellant's position, along with supporting data and information. The appellant shall send a copy of the notice of appeal and accompanying documents to the Federal and State agencies involved.

(b) No extension of time will be permitted for the filing of a notice of appeal.

(c) The Secretary may approve a reasonable request for an extension of time to submit supporting information so long as the request is filed with the Secretary within the 30-day period. Normally, the Secretary shall limit an extension period to 15 days.

§ 930.126 Federal and State agency responses to appeals.

(a) Upon receipt of the notice of appeal and supporting information, the Federal and State agencies shall have 30 days to submit detailed comments to the Secretary. Copies of such comments shall be sent to the appellant and other agency within the same time period.

(b) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.127 Public notice; receipt of comments.

(a) The Secretary shall provide timely public notice of the appeal within 15 days of receipt of the notice. At a minimum, public notice shall be provided in the immediate area of the coastal zone which is likely to be affected by the proposed activity. At the time public notice is provided, the Federal and State agencies shall provide the public with convenient access to copies of the appellant's notice of appeal and accompanying public information, and to the public information in the agencies' detailed comments.

(b) Interested persons may submit comments to the Secretary within 30 days from the date of public notice, with copies provided to the appellant and to the Federal and State agencies within the same time period.

(c) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.128 Dismissal of appeals.

The Secretary may dismiss an appeal for good cause. Good cause shall include, but is not limited to:

(a) Failure of the appellant to submit a notice of appeal within the required 30-day period.

(b) Failure of the appellant to submit the supporting information within the required period or approved extension period;

(c) Secretarial receipt of a detailed comment from the Federal agency stating that the agency has disapproved the Federal license, permit or assistance application;

(d) Failure of the appellant to base the appeal on grounds that the proposed activity either (1) is consistent with the objectives or purposes of the Act or (2) is necessary in the interest of national security.

§ 930.129 Public hearings.

The Secretary may order a hearing independently or in reponse to a request. If a hearing is ordered by the Secretary it shall be guided by the procedures described within § 930.113.

§ 930.130 Secretarial review.

(a) In reviewing an appeal, the Secretary shall find that a proposed Federal license or permit activity, or a Federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, when the information submitted supports this conclusion.

(b) The Secretary shall make all reasonable efforts to complete consideration of an appeal within 90 days from the date of public notice.

(c) Following consideration of the appeal, the Secretary shall issue a decision in writing to the appellant and to the Federal and State agencies indicating whether the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security; the decision shall include the basis for such finding. The Secretary shall provide public notice of the decision.

(d) The decision of the Secretary shall constitute final agency action for the purposes of the Administrative Procedure Act.

§ 930.131 Federal agency responsibility.

(a) If the Secretary finds that the proposed activity is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security, the Federal agency may approve the activity.

(b) If the Secretary does not make either of these findings, the Federal agency shall not approve the activity.

§ 930.132 Review initiated by the Secretary.

(a) The Secretary may choose to consider whether a Federal license or permit activity, or a Federal assistance activity, is consistent with the objectives or purposes of the Act, or is necessary in the interest of national security. Secretarial review may be initiated either before of after the completion of State agency review. The Secretary's decision to review the activity may result from an independent concern regarding the activity or a request from interested parties. If the Secretary decides to initiate review, notification shall be sent to the applicant, person or applicant agency, and to the Federal and State agencies. The notice shall include a statement describing the reasons for the review and shall contain a request for submission of detailed comments to be submitted within 30 days from receipt of the notification. Copies of comments shall be exchanged among the parties.

(b) Requests for extensions may be made pursuant to § 930.125(c).

§ 930.133 Public notice; receipt of comments; public hearings.

(a) Upon receipt of detailed comments from the parties, the Secretary shall provide public notice and request public comments in accordance with the provisions in § 930.127.

(b) The Secretary may order a hearing in accordance with the provisions in § 930.129.

§ 930.134 Secretarial review; Federal agency responsibility.

(a) Secretarial review shall be undertaken in accordance with the provisions in § 930.130.

(b) Federal agencies are responsible for adhering to the provisions in § 930.131 when deciding to approve or deny an application for an activity objected to by a State agency and independently reviewed by the Secretary.

Subpart I—Assistant Administrator Reporting and Continuing Review of Federal Actions Subject to the Federal Consistency Requirements

§ 930.140 Objectives.

The provisions of this subpart provide procedures to permit interested parties to notify the Assistant Administrator of Federal actions (a) believed to be inconsistent with an approved management program but which are not so found by the Federal or State reviewing agency, and (b) believed to have been incorrectly determined to be inconsistent with an approved management program. This subpart also provides for the reporting of any Federal actions found by the Assistant Administrator to be inconsistent with an approved management program and for the performance review of State implementation of the Federal consistency provisions of this part.

§ 930.141 Notification of Federal actions believed to be inconsistent with approved management programs.

(a) Interested parties are invited to submit to the Assistant Administrator detailed comments related to the alleged inconsistency of Federal activities including development projects, Federal license or permit activities, including those described in detail in OCS plans, and Federal assistance activities which are subject to the requirements of this part, and which have not been found by a Federal agency or State agency to be inconsistent with an approved management program. Copies of such comments should be sent to relevant Federal and State agencies, and to the applicant, person or applicant agency as appropriate.

(b) Comments need not conform to any particular form, but should be specific, substantive and factual, and must describe how the Federal action is or would be inconsistent with an approved management program.

(c) Commentators are encouraged to recommend modifications or alternatives to the existing or proposed action which would enable it to be consistent with the management program.

(d) The Assistant Administrator shall assure that public information within such comments is made available for public inspection.

§ 930.142 Notification of Federal actions believed to have been incorrectly determined to be inconsistent with an approved management program.

(a) Interested parties are invited to submit to the Assistant Administrator detailed comments related to Federal license and permit activities, including those described in detail in OCS plans, and Federal assistance activities which are believed to have been incorrectly determined by a State agency to be inconsistent with an approved management program. Copies of such comments should be sent to the relevant Federal and State agencies, and to the applicant, person, or applicant agency as appropriate.

(b) Comments need not conform to any particular form, but should be specific, substantive, and factual, and must clearly describe the basis for the belief that the State agency has incorrectly objected to the Federal action on the grounds of its inconsistency with the management program.

(c) The Assistant Administrator shall assure that public information within such comments is made available for public inspection.

§ 930.143 Assistant Administrator reporting.

After considering the views of interested parties, the relevant Federal agency, State agency, and the applicant, person, or applicant agency, as appropriate, the Assistant Administrator shall determine whether the Federal action will be included in the annual report listing of inconsistent Federal actions.

§ 930.144 Assistant Administrator advisory statements.

Upon request, the Assistant Administrator may issue as advisory statement prior to the issuance of the annual report indicating whether a Federal action will be listed within the annual report as being inconsistent with an approved management program.

§ 930.145 Review of the implementation of Federal consistency provisions.

As part of the responsibility to conduct a continuing review of approved management programs, the Assistant Administrator shall review the performance of each State's implementation of the Federal consistency provisions in this part. The Assistant Administrator shall use information received pursuant to this subpart to evaluate instances where a State agency is believed to have either failed to object to inconsistent Federal actions, or improperly objected to consistent Federal actions. This evaluation shall be incorporated within the Assistant Administrator's general efforts to ascertain instances where a State has not adhered to its approved management program and such lack of adherence is not justified.

PART 931—COASTAL ENERGY IMPACT PROGRAM

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Authority: Sec. 308, Coastal Zone Management Act of 1972 (Pub. L. 92-583, 86 Stat. 1280, 16 U.S.C. 1451 et seq.), as amended by Pub. L. 95-327, unless otherwise noted.

Source: 44 FR 29584, May 21, 1979, unless otherwise noted.

Subpart A—General

§ 931.1 Coastal Energy Impact Program—general description.

The Coastal Energy Impact Program (CEIP) was established under section 308 of the Act to provide coastal states and local governments in such states with Federal financial assistance to meet certain needs that result from specified energy development activities. Such assistance includes:

(a) Grants to coastal states under subsection (b)(5)(B) for the study of, planning for, development of, and the carrying out of projects and programs to provide new or improved public facilities or public services required as a result of outer continental shelf energy activity;

(b) Grants under subsections (b)(5)(C) and (d)(4) for preventing, reducing, or ameliorating unavoidable losses of valuable coastal environmental or recreational resources when such losses result from coastal energy activity;

(c) Grants under subsection (c)(1) for the study of, and planning for significant economic, social, or environmental consequences in the coastal zone when such consequences result from the siting, construction or operation of new or expanded energy facilities;

(d) Credit assistance under subsections (d)(1) and (d)(2) and appropriate forms of repayment assistance under subsections (d)(3) and (b)(5)(A) to provide new or improved public facilities or public service required as a result of coastal energy activity;

(e) Grants under subsection (c)(2) to assist coastal States likely to be affected by outer continental shelf energy activity in carrying out their responsibilities under the Outer Continental Shelf Lands Act.

§ 931.2 Objectives of the CEIP.

(a) The principal objectives of the CEIP are:

(1) To improve and strengthen coastal zone management in the United States by providing financial assistance only for programs and projects that are in accord with the policy of the Coastal Zone Management Act and the coastal zone management objectives of the individual States.

(2) To preserve and enhance the Nation's valuable coastal recreational and environmental resources by

(i) Encouraging the timely and thorough planning for and the management of adverse consequences in the coastal zone caused by energy facility siting and energy resource development; and

(ii) Encouraging coastal States and local governments to exercise effectively their responsibilities to minimize losses to valuable coastal environmental or recreational resources that could result from coastal energy activity.

(3) To advance the National objective of obtaining a greater degree of energy self sufficiency by encoraging the rational and timely development of domestic coastal energy resources and energy resource transportation systems.

(4) To protect and improve the quality of the human environment in the coastal zone by providing financial assistance to coastal States and units of local government for new and improved public facilities required as a result of coastal energy activity.

(5) To provide financial assistance that is simple to administer and that permits the coastal States and units of local government a high degree of control and discretion.

(6) To assist coastal States likely to be affected by outer continental shelf energy activity in carrying out their responsibilities under the OCS Lands Act.

(b) The CEIP will be administered in a manner that will strike a balance between the major National goals of obtaining a greater degree of energy self sufficiency and protecting the coastal environment:

(1) Only coastal energy activity necessary for the rational, timely and orderly development of the Nation's coastal energy resources will be encouraged; and

(2) Unnecessary development in the coastal zone will be discouraged by providing financial assistance only for those public facilities and public services that are actually needed because of coastal energy activity.

Subpart B—Definitions

§ 931.9 Index to definitions.

The following listing includes important terms defined in Part 931 keyed to the section where they are defined.

Term	Section
Act	931.10(a)
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Borrower	931.82
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Coastal zone	931.11
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Exploration	931.17(c)
First landed	931.121(a)
Fund	931.12
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Joint funding	931.98(c)
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New or expanded energy facility	931.19
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New or improved service	931.42(e)
NOAA	931.22
OCZM	931.22
Outer Continental Shelf	931.16
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Person	931.72(e)
Production	931.17(e)
Public facility	931.42(a)
Public service	931.42(c)
Section	931.10(b)
Significantly affected	931.14
Unavoidable	931.72(d)
Unit of general purpose local government	931.20
Unit of local government	931.21
Valuable environmental resource	931.72(a)
Valuable recreational resource	931.72(b)

§ 931.10 Act.

(a) The term "Act" means the Coastal Zone Management Act of 1972, as amended, (16 U.S.C. 1451 et seq.).

(b) The term "section" or "subsection" means a section or subsection of the Coastal Zone Management Act of 1972, as amended, unless it is clear from the context that some other meaning is intended.

§ 931.11 Coastal zone.

The "coastal zone" is that area of land and water whose boundaries are determined by a State under § 920.11 of this chapter for purposes of the development of a coastal zone management program under section 305, or under § 923.11 of this chapter for purposes of administering a coastal zone management program under section 306, or as part of a management program which is consistent with the policies set forth in section 303. Such boundaries must be approved by the Assistant Administrator.

§ 931.12 Fund.

The term "Fund" means the Coastal Energy Impact Fund established under section 308(h).

§ 931.13 Coastal energy activity.

(a) The term "coastal energy activity" is limited to the following activities:

(1) Any Outer Continental Shelf energy activity;

(2) Any transportation, conversion, treatment, transfer, or storage of liquefied natural gas; or

(3) Any transportation, transfer, or storage of oil, natural gas, or coal (including, but not limited to, by means of any deepwater port, as defined in section 3(10) of the Deepwater Ports Act of 1974 (33 U.S.C. 1502(10)).

(b) An activity is a "coastal energy activity" only to the extent that:

(1) The conduct, support, or facilitation of such activity requires and involves the siting, construction, expansion or operation of any equipment or facility; and

(2) The Assistant Administrator determines that a technical requirement exists which necessitates that such siting, construction, expansion, or operation be carried out in, or in close proximity to, the coastal zone of any coastal State.

(c) Such technical requirements are limited to:

(1) Dependency on coastal waters;

(2) Safety;

(3) Proximity to oil, natural gas, or coal fields;

(4) Location of markets;

(5) Federal siting regulations or decisions; and

(6) Type and amount of required land.

(d) The siting, construction, expansion, or operation of any equipment or facility shall be considered to be "in close proximity to" the coastal zone of any coastal State if such coastal zone has been or is likely to be significantly affected by such siting, construction, expansion, or operation.

§ 931.14 Significantly affected.

The coastal zone of a coastal State is "significantly affected" by the siting, construction, expansion, or operation of an energy facility if such siting, construction, expansion, or operation:

(a) Causes or is likely to cause population changes in the coastal zone;

(b) Changes or is likely to change employment patterns in the coastal zone, including those in fishing and tourism;

(c) Damages or threatens to damage or degrade any valuable environmental or recreational resources in the coastal zone, including ambient air, water or noise quality, or any other Federal, State, or local environmental standard.

(d) Increases or threatens to increase risks to public health, safety, or real property in the coastal zone.

§ 931.15 New or expanded coastal energy activity.

(a) The term "new or expanded coastal energy activity" means any coastal energy activity of the siting, construction, expansion, initial operation, or replacement, in whole or in part, of any equipment or facility required by the conduct, support, or facilitation of such activity takes place after July 26, 1976.

(b) The term "expansion" includes both the physical expansion of a facility and the expansion of the output of the facility.

(c) The term "initial operation" is intended to include the case in which a previously operating but then idle energy facility is reactivated after July 26, 1976.

§ 931.16 Outer Continental Shelf.

The term "Outer Continental Shelf" or "OCS" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters, as defined in 43 U.S.C. 1301, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

§ 931.17 Outer Continental Shelf energy activity.

(a) The term "Outer Continental Shelf energy activity" means:

(1) Any exploration for, or any development or production of, oil or natural gas from the Outer Continental Shelf; or

(2) The siting, construction, expansion or operation of any new or expanded energy facilities that are directly required by such exploration, development or production.

(b) The term "directly" required by Outer Continental Shelf energy activity refers to a new or expanded energy facility that has a technical requirement that necessitates its location in or in close proximity to the coastal zone and is:

(1) Any equipment or facility used primarily in the exploration for or the development, production or transportation of any oil or natural gas from the Outer Continental Shelf; or

(2) Any facility or equipment used primarily for the manufacture, production or assembly of equipment, machinery, or devices that are necessary to and ordinarily used in the exploration for, or development or production or transportation of oil or natural gas from the Outer Continental Shelf.

Such equipment and facilities include but are not limited to:

(i) Gas processing and treatment plants;

(ii) Platform fabrication yards;

(iii) Pipe coating yards;

(iv) Service bases;

(v) Marine pipelines;

(vi) Drilling rigs and drill ships;

(vii) Production platforms;

(viii) Offshore terminals;

(ix) Marine repair and maintenance facilities;

(x) Oil storage terminals.

(c) The term "exploration" means the process of searching for oil or natural gas, including (1) geophysical surveys where magnetic, gravity, seismic, or other systems are uses to detect or imply the presence of oil or natural gas, and (2) any drilling, whether on or off known geological structures, including the drilling of a well in which a discovery of oil or natural gas in paying quantities is made and the drilling of any additional delineation well after such discovery which is needed to delineate any reservoir and to determine whether to proceed with development and production.

(d) The term "development" means those activities which take place following discovery of oil or natural gas in paying quantities, including geophysical activity, drilling, platform construction, and operation of all on shore support facilities, and which ar for the purpose of ultimately produc ing the oil and gas discovered.

(e) The term "production mean those activities which take place afte the successful completion of an means for the removal of oil or natu ral gas, including such removal, fiel operations transfer of oil or natura gas to shore, operation monitoring maintenance, and work-over drilling.

§ 931.18 Energy facility.

(a) The term "energy facility means any equipment or facilit which is or will be used primarily:

(1) In the exploration for, or the de velopment, production, conversion storage, transfer, processing, or trans portation of, any energy resource; or

(2) For the manufacture, production or assembly of equipment, machinery products, or devices which are in volved in the activities described in paragraph (a)(1) of this section.

(b) The term includes:

(1) Electric generating plants, in cluding those utilizing fossil or bio mass fuels, nuclear power, sola energy, ocean thermal energy conver sion, tidal, wave or, wind power, or geothermal energy, and associated transmission systems;

(2) Petroleum refineries and associated facilities;

(3) Gasification plants;

(4) Facilities used for the transportation, conversion, treatment, transfer, or storage of liquefied natural gas;

(5) Uranium enrichment or nuclea fuel processing facilities;

(6) Coal storage, transportation or transfer facilities;

(7) Drilling rigs, platforms, subsea completions, and subsea production systems;

(8) Construction yards for platforms and exploration rigs, pipe coating yards, bases supporting platforms and pipeline installation, and crew and supply bases;

(9) Oil and gas storage facilities;

(10) Marine pipeline systems;

(11) Oil and gas processing facilities;

(12) Facilities, including deepwater ports, for the transfer of petroleum;

(13) Facilities for geopressurized gas; and

(14) Terminals which are associated with any of the foregoing.

§ 931.19 New or expanded energy facility.

The term "new or expanded energy facility" refers to an energy facility whose siting, construction, expansion, initial operation, or replacement, in whole or in part, takes place after July 26, 1976.

§ 931.20 Unit of general purpose local government.

(a) The term "unit of general purpose local government" means:

(1) Any political subdivision of any coastal State that (in whole or in part) is located in or has authority over any portion of such State's coastal zone; or

(2) Any political subdivision of any coastal State that is located within a political subdivision of such coastal State that (in whole or in part) is located in or has authority over any portion of such State's coastal zone; or

(3) Any special entity created by such coastal State or political subdivision that (in whole or in part) is located in or has authority over any portion of such State's coastal zone.

(b) The term "unit of general purpose local government" is limited to those entities described in paragraph (a) of this section that provide any public facility or public service financed in whole or in part by taxes or user fees.

§ 931.21 Unit of local government.

The term "unit of local government" means any unit of general purpose local government, as defined in § 931.20 or any agency recognized or designated as an areawide or regional comprehensive planning and development agency pursuant to Office of Management and Budget Circular A-95, under section 204 of the Demonstration Cities and Metropolitan Development Act of 1966, or under Title IV of the Intergovernmental Cooperation Act of 1968.

§ 931.22 NOAA and OCZM.

(a) The acronym "NOAA" means the National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

(b) The acronym "OCZM" means the Office of Coastal Zone Management of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

§ 931.23 Assistant Administrator.

The term "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

§ 931.24 NEPA and EIS.

(a) The acronym "NEPA" means the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.).

(b) The acronym "EIS" means an Environmental Impact Statement prepared pursuant to NEPA.

Subpart C—Basic Eligibility

§ 931.25 Eligible coastal State.

(a) No coastal State is eligible to receive an allotment or any financial assistance under this part unless such State:

(1) Has a management program that is approved under section 306; or

(2) Is receiving a grant under sections 305(c) or (d); or

(3) Is making, in the judgment of the Assistant Administrator, satisfactory progress toward the development of a management program that is consistent with the policies set forth in section 303; and

(4) The governor of such State has designated a State agency or agencies:

(i) To apply for financial assistance under section 308;

(ii) To assure, to the maximum extent practicable, that financial assistance provided under section 308 is apportioned, allocated, and granted to units of local government within such State on a basis which is proportional to the extent to which such units need such assistance; and

(iii) To receive and administer section 305 grants or section 306 grants pursuant to § 923.91 of this chapter, or to administer a State coastal management program which is consistent with the policies set forth in section 303.

(b) While preferable in terms of coordination, it is not required that a single agency perform all three functions stated in paragraph (a)(4) of this section and it is permissible to designate a separate agency to apply for and receive financial assistance under section 308(c)(2). However, in the event different agencies are designated under paragraphs (a)(4)(i), (ii), and (iii) of this section, one agency must be designated to assure coordination with the others.

§ 931.26 Satisfactory progress.

(a) The Assistant Administrator shall judge that a State is making satisfactory progress toward the development of a management program consistent with the policies set forth in section 303 if one of the following conditions is met:

(1) A coastal State has exhausted its eligibility for program development funding under section 305 without achieving program implementation approval under section 306, but is still pursuing development and implementation of a management program consistent with the policies set forth in section 303; or

(2) A coastal State's eligibility for program funding under section 305 or section 306 has been suspended or terminated but the State is making adequate efforts to reacquire eligibility under section 305 or 306 while still pursuing development of a management program consistent with the policies set forth in section 303; or

(3) A coastal State is otherwise pursuing a comprehensive management program which is consistent with the policies set forth in section 303 and for good cause shown is not developing or implementing such program under section 305 or 306.

(b) The phrase "consistent with the policies set forth in section 303" refers to a management program which incorporates:

(1) Policies which provide for the preservation, protection, development, and, where possible, the restoration or enhancement of the resources of the State's coastal zone;

(2) Provisions which insure wise use of the land and water resources of the coastal zone, giving full consideration to ecological, cultural, historic, and esthetic values, as well as to needs for economic development. Such provisions shall include, but are not limited to:

(i) Identification of a coastal zone which is capable for being delineated and which is subject to management under the program;

(ii) Identification of permissible land and water uses for the area within the coastal zone;

(iii) Procedures for assuring that land and water uses of regional and national benefit are not arbitrarily restricted or excluded in policies or management mechanisims developed pursuant to the State's program;

(iv) State and local legal authorities and organizational structures sufficient to effectuate management over identified land and water uses within the coastal zone; and

(v) Coastal zone water pollution and air pollution control consistent with the requirements of the Clean Water Act, as amended, and the Clean Air Act, as amended.

(3) An adequate opportunity for Federal agencies having interests affecting the State's coastal zone to participate in the development of the State's management program and have their views adequately considered; and

(4) An adequate opportunity for local governments, State and regional agencies, commercial and industrial groups, and the general public to participate in the development of the State's management program and have their views adequately considered.

§ 931.27 Eligibility determination.

Before allotting or awarding any financial assistance to any coastal State under this part the Assistant Administrator will determine whether the State is eligible as described in this Subpart C. No allotments will be made and no funds will be awarded if the State is not eligible, and all funds previously allotted will be held in the State's account until the end of the fiscal year in which the State is determined to be not eligible. If the State has not regained eligibility under this subpart by the end of that fiscal year those funds will be reallotted among other eligible coastal States as soon as practicable.

Subpart D—Coastal Energy Impact Grants

AUTHORITY: Secs. 308 and 317, Coastal Zone Management Act of 1972, as amended.

SOURCE: 47 FR 21024, May 17, 1982, unless otherwise noted.

§ 931.30 General.

This subpart sets forth the objectives of providing financial assistance to coastal states under section 308(c) and its allowable uses. It also describes procedures for allotting section 308(c) moneys among eligible coastal states and for applying for assistance under section 308(c).

§ 931.31 Objectives.

The objectives of assistance under this subpart are:

(a) To help coastal states and units of local government plan for economic, social, or environmental consequences of new or expanded energy facilities and to prevent, reduce, or mitigate losses resulting from the transportation, transfer, or storage of coal or from alternative ocean energy activity.

(b) To help coastal states develop the capability to participate effectively in Federal policy, planning, and managerial decisions relating to the development of OCS oil and gas resources.

(c) To provide financial assistance that is simple to administer and that permits the coastal states and units of local government a high degree of control and discretion.

(d) To improve and strengthen coastal zone management in the United States.

§ 931.32 Definitions.

(a) *Coal.* The term "coal" includes all forms of anthracite and bituminous coal, peat, coke, and lignite. In addition to these substances, the term includes ash and sludge, which are waste products of burning coal.

(b) *Coal facility.* The term "coal facility" includes the following:

(1) Any facility used in the transportation, transfer, or storage of coal. Such facilities include, but are not limited to:

(i) Coal loading docks;

(ii) Coal barging terminals;

(iii) Coal ports;

(iv) Coal storage yards;

(v) Rail transport facilities.

(2) Any facility that converts coal into another form of energy useable by consumers or industry including but not limited to:

(i) Power plants;

(ii) Synthetic fuel plants;

(iii) Liquefaction plants.

(3) Any facility that utilizes, transports, transfers, stores, handles, processes or produces coal, including mines and steel mills.

(c) *Alternative Ocean Energy (AOE) facility.* The term "alternative ocean energy facility" means:

(1) Any facility located in or seaward of, the coastal zone whose primary purpose is to utilize the mechanical, chemical, physical, biological or thermal properties of ocean or lake waters in the conversion of those properties into a form of energy usable by consumers or industry. Facilities whose only reliance on ocean or lake waters is for cooling (such as nuclear power plants), liquefied natural gas facilities, and facilities for the exploration for and development of offshore oil and natural gas do not constitute AOE facilities. Solar facilities will also be considered AOE facilities. AOE facilities include, but are not limited to:

(i) Ocean Thermal Energy Conversion (OTEC).

(ii) Tidal and wave generation of electricity.

(iii) Ocean current generation of electricity.

(iv) Salinity gradient generation of electricity.

(v) Pumped storage generation of electricity.

(vi) Solar generation of electricity.

(vii) Biomass production—e.g., kelp farms.

(viii) Wind generation of electricity that depends on the sea or lake breeze.

(d) *Likely to be affected by OCS energy activity.* The Assistant Administrator will find a coastal state "likely to be affected by OCS energy activity" if the Assistant Administrator determines that:

(1) The state can reasonably expect to be exposed to significant social, economic, or environmental consequences as a result of any OCS lease sale that has taken place or is scheduled to take place under the Department of the Interior's (DOI) Five Year Planning Schedule; or

(2) The state has administrative, policy, operational, or managerial responsibilities under the OCS Lands Act that should properly be supported with section 308(c) funds.

§ 931.33 Eligibility for financial assistance under this subpart.

(a) A coastal state is eligible for financial assistance if it meets the basic eligibility requirements of Subpart C of this part.

(b) A unit of local government may apply for assistance under this subpart through the state agency designated under Subpart C of this part to apply for CEIP assistance.

§ 931.34 Allowable uses.

(a) Funds granted to a state under section 308(c) must be used in accordance with the provisions of this section.

(1) *Planning.* States may use section 308(c) funds to plan for any economic, social, or environmental consequence that has occurred, is occurring, or is likely to occur in the coastal zone as a result of siting, constructing, expanding or operating new or expanded energy facilities that significantly affect the coastal zone, and for reasonable costs of administering the state coastal energy impact program.

(2) *OCS State participation.* States likely to be affected by OCS energy activity may use section 308(c) funds to carry out their responsibilities under the OCS Lands Act. These responsibilities include participating in the administrative, policy, operational, and managerial decisions relating to management of the oil and natural gas resources of the Outer Continental Shelf.

(3) *Coal and AOE impact mitigation.* States may use section 308(c) funds to design and implement projects (including construction and land acquisition) to prevent, reduce, or mitigate unavoidable losses to valuable coastal environmental and recreational resources resulting from the transportation, transfer, or storage of coal or from AOE activities.

§ 931.35 Section 308(c) allotment.

(a) The Assistant Administrator will develop a formula for allotting available section 308(c) funds among eligible coastal states. This formula will be designed to estimate the relative need for planning, OCS participation, and coal and AOE impact mitigation among eligible states.

(b) This formula will be based on the number of existing and proposed new or expanded energy facilities, the number of existing and proposed coal facilities that significantly affect the coastal zone, the number of existing and proposed AOE facilities located in or seaward of the coastal zone, the nature of their impacts and other relevant factors deemed appropriate by the Assistant Administrator such as coal tonnage, OCS leasing, production of OCS oil and natural gas, shoreline mileage, and coastal county population.

(c) Each fiscal year, before computing an allotment, the Assistant Administrator will submit this formula to all eligible coastal states for review and comment. If appropriate, the formula will be revised before any final allotments are calculated.

(d) The Assistant Administrator may establish minimum and maximum allotments.

§ 931.36 Application for financial assistance.

(a) Applications for financial assistance under this subpart may be submitted as soon as states are notified of their allotments under section 308(c).

(b) Applications for assistance under this subpart must contain the following certification and information:

(1) A clear and brief description of the projects and activities that will be funded under section 308(c) as they relate to allowable uses under § 931.34. For construction projects, as defined in the Office of Management and Budget Circular A-102, or planning

projects that are the first stages of site specific development projects, the following additional information is required:

(i) Environmental impact assessment data in detail sufficient to allow the Assistant Administrator to determine whether an EIS will be required under NEPA;

(ii) Copies of all necessary major Federal permit or license approvals;

(iii) A Preliminary Engineering Report.

(2) A certification by the state agency designated under § 931.25(a)(4)(i) that the assistance for the purposes specified in § 931.34(a)(1) and (3) has been or will be allocated within the State in accord with the intrastate allocation process described in Subpart J of this part.

(3) A certification by the state agency designated under § 931.25(a)(4)(iii) that the assistance will be used in a manner that is compatible with the state's developing, or consistent with the state's approved, coastal zone management program.

(c) Allotted funds not applied for by the end of the fiscal year for which allotments were made may be reallotted by the Assistant Administrator among other eligible states.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[47 FR 21024, May 17, 1982, as amended at 48 FR 29137, June 24, 1983]

§ 931.37 Limitations on expenditures.

(a) Section 308(c) funds expended by a state for the purposes described in § 931.34 may not exceed 70 percent of the actual cost of carrying out projects;

(b) States and local governments may use in-kind contributions as the non-federal matching share in accordance with OMB Circular A-102;

(c) Section 308(c) funds may not be used:

(1) For the prevention, reduction, or mitigation of any loss of an environmental or recreational resource that is directly attributable to the sale, lease, or rental of such resource by a state agency or unit of local government when the sale, lease, or rental occurs after October 17, 1980;

(2) To pay for that part of a project designed to prevent, reduce, or mitigate the loss of a valuable environmental or recreational resource which is incommensurate with the value of the loss or which can be paid for with funds readily available from any other Federal program;

(3) To pay for that part of a loss:

(i) That occurs after July 26, 1976, and

(ii) That could have been prevented by a reasonable exercise of a state's existing regulatory authority.

(4) For architectural, engineering, and other technical service fees or costs unless:

(i) Compensation is comparable to the cost of similar work awarded through open competitive bidding;

(ii) Compensation is not based on a cost plus a percentage-of-cost; and

(iii) Design and performance standards conform to professionally recognized national standards.

(5) The purchase of movable construction related equipment such as dump trucks and excavating equipment unless expressly authorized by the financial assistance award.

(d) All awards and expenditures of funds under this subpart are subject to the applicable requirements specified in Subpart I.

Subpart E—Financing Public Facilities and Public Services

§ 931.40 General.

(a) This subpart states the objectives for providing assistance to coastal States and units of general purpose local government to finance new or improved facilities and public services under section 308(d) (1) and (2) and section 308(b)(5) (B) and (C). This subpart also describes the procedures for allotting section 308(d) credit assistance among eligible coastal States and the procedures for applying for credit assistance and section 308(b) formula grants to construct new or improved public facilities or to provide new or improved public services.

(b) The procedures for allotting section 308(b) formula grants are described in Subpart K.

§ 931.41 Objectives.

The objectives of assistance under this subpart are:

(a) To help coastal States and units of general purpose local government provide new or improved public facilities and public services needed because of coastal energy activity or OCS energy activity;

(b) To provide front-end financing that can be expected to be repaid later from revenues generated by the coastal energy activity;

(c) To assure that necessary development in coastal areas is consistent with State coastal zone management objectives, the safeguarding of valuable national coastal environmental and recreational resources, and public safety; and

(d) To discourage unnecessary development in the coastal zone by providing assistance only for those public facilities and public services actually needed because of coastal energy activity or OCS energy activity.

§ 931.42 Definitions.

(a) The term "public facility" includes, but is not limited to, the facilities listed in paragraph (b) of this section to the extent they are owned, operated, or financed by the State or unit of general purpose local government. The term "public facility" does not include facilities to the extent they primarily serve industrial facilities unless:

(1) Industrial user charges will be a primary source of revenue to repay the loan received or obligation guaranteed under this subpart; or

(2) The Assistant Administrator finds that the facility is necessary to prevent significant adverse impacts in the coastal zone.

(b) *Public facility*—(1) *Education.* Day care centers; primary, secondary, and general vocational schools, including portable classrooms and temporary facilities; school equipment; libraries, including books and equipment;

(2) *Environmental protection.* Facilities and equipment used to: improve, monitor, or prevent degradation of air, water, noise or solid waste standards; prevent or mitigate damage to environmental or recreational resources; assure the continued viability of fish, shellfish, and wildlife habitat; prevent or control erosion. Land aquisition for environmental protection;

(3) *Government administration.* Facilities and equipment essential for general government administration;

(4) *Health care.* Emergency medical facilities and equipment, including ambulances; clinic and hospital buildings and equipment; alcohol and drug abuse centers; emergency shelter and sanitary facilities; and epidemiological screening or other assistance to assure community health.

(5) *Public safety and law enforcement.* Detention centers, police equipment and stations, fire stations and firefighting equipment, fire training centers, animal control facilities, communication facilities and equipment, and rescue facilities and equipment;

(6) *Recreation.* Facilities and equipment for amateur sports and performing arts, community recreational centers, local parks and playgrounds acquisition of parkland or beaches or of public access to such land or beaches;

(7) *Transportation.* Street and street lighting, roads, bridges, road maintenance equipment, parking associated with public facilities, docks, air and water navigation aids, canals and navigation facilities, air terminals in remote areas, mass transit including bus and ferry systems;

(8) *Public utilities.* Electric generating plants and distribution systems; natural gas distribution systems; solid waste collection systems; waste collection and treatment systems, including drainage; water supply systems; and telephone systems.

(9) *Housing.* Single and multi-family housing owned and operated by a public entity and all necessary public infrastructure to support public housing developments.

(c) The term "public service" means any service authorized by law to be provided by a State or unit of general purpose local government to the extent that it is provided or financed by a State or unit of general purpose local government. The term "public service" does not include a service to the extent it primarily serves industrial users unless:

(1) Industrial user charges will be a primary source of revenue to repay the loan received or obligation guaranteed under this subpart; or

(2) The Assistant Administrator finds that this service is necessary to prevent or mitigate significant adverse impacts in the coastal zone.

(d) A public facility is considered "new or improved" if it is constructed, expanded, renovated, initially operated, or if its efficiency is improved after July 26, 1976.

(e) A public service is considered "new or improved" if:

(1) The proposed type or increased level of service was not offered in the fiscal year before the application for assistance for such service, or

(2) If it improves the efficiency of existing public services.

§ 931.43 Eligibility.

(a) To be eligible for financial assistance under this subpart, a coastal State must meet the basic eligibility requirements of Subpart C.

(b) A unit of general purpose local government may apply for assistance under this subpart through its State.

§ 931.44 Allowable uses.

(a) Credit assistance available from the Fund under sections 308(d) (1) and (2) is to be used to finance new or improved public facilities and public services that are required as a result of coastal energy activity.

(b) Grant assistance under section 308(b) is to be used for the development of, and the carrying out of projects and programs necessary to provide new or improved public facilities and public services that are required as a result of OCS energy activity.

(c) The following are allowable project costs under this subpart to the extent they are reasonable and necessary to provide new or improved public facilities or public services:

(1) Land acquisition including fee simple, leases, easements, and rights-of-way.

(2) Architectural, engineering, and other technical service fees or costs except that:

(i) Compensation must be comparable to the cost of similar work awarded through open competitive bidding;

(ii) Compensation must not be based on a cost plus a percentage-of-cost; and

(iii) Design and performance standards must conform to professionally recognized national standards.

(3) Construction expenses, including, but not limited to, construction materials, fixtures, appurtenances, and fixed machinery and equipment. The purchase of movable construction related equipment such as dump trucks and excavating equipment will be allowable only if expressly authorized in the grant or loan agreement;

(4) Site preparation and improvement;

(5) The acquisition of movable equipment essential for the maintenance of new or improved public facilities or services; and

(6) Public services to the extent that the applicant can illustrate that State or local funds will be available to meet the cost of the service in the future; or that the service is of the type that a one-time expenditure of funds will meet a stated goal without the dependency of future funding for successful completion.

(7) The assessment and mitigation of environmental, social, and economic impacts of the proposed project.

(8) The following, but only if the project or program is funded under sections 308(d) (1) or (2):

(i) Capitalized interest during construction for a project in which it is necessary or advantageous for the recipient to borrow funds to finance construction costs and where State law permits such a loan.

(ii) Capitalized interest during development limited to that which is required to meet interest payments after the project is operating but before income is sufficient to provide such payment. However, such amounts will be an eligible project cost only to the extent that the recipient does not have any other funds or sources of revenue for such interest payments.

(iii) Initial public service expenses (operating costs) including supply inventories, salaries and utilities limited to those required to meet public service expenses after the project is operating but before income is sufficient to provide for such services. However, such amounts will be an eligible project cost only to the extent that the recipient does not have any other funds or sources of revenue for such public service expense.

(d) All awards and expenditures of funds under this subpart are subject to the applicable requirements specified in Subpart I.

§ 931.45 Credit assistance inventory.

(a) At the end of each fiscal year the Assistant Administrator will compile for each eligible coastal State an inventory of new or expanded coastal energy activities.

(b) The purpose of this inventory is:

(1) To identify those new or expanded coastal energy activities that have caused, are causing, or are likely to cause a need for new or improved public facilities and public services; and

(2) To provide a basis for estimating the relative need for credit assistance among eligible coastal States.

(c) To assure that the credit assistance inventory reasonably reflects actual need for new or improved public facilities and public services, a new or expanded coastal energy activity will be placed on the inventory only if the Assistant Administrator determines that such activity is likely to necessitate new or improved public facilities or public services, and

(1) A major state or federal permit has been approved to conduct such activity; or

(2) Such activity is described in exploration plans or production and development plans approved by the Department of the Interior; or

(3) The Assistant Administrator, based on reasonable evidence submitted by the State, determines that such activity is likely to be carried out in the near future.

(d) To assure an equitable distribution of credit assistance among coastal States, a coastal energy activity will not be placed on the inventory for a fiscal year if such activity:

(1) Was on the inventory in any preceding fiscal year in which credit assistance was allotted to the State on account of this activity; and

(2) The Assistant Administrator determines that adequate credit assistance was allotted to a coastal State as a result of such activity. The State may submit evidence to the Assistant Administrator showing the inadequacy of any credit assistance allotment.

[44 FR 29584, May 21, 1979; 45 FR 78118, Nov. 25, 1980]

§ 931.46 Allotment formula.

(a) The Assistant Administrator will develop a formula for allotting funds appropriated under sections 308(d) (1) and (2). This formula will be designed to estimate the need for new or improved public facilities and services and will be based on, and limited to, the following factors:

(1) The number of additional individuals who are expected to become employed in new or expanded coastal energy activity and will reside in the coastal State;

(2) The new population in the Coastal State associated with such energy activity; and

(3) The standardized unit costs for new or improved public facilities and public services required as a result of such expected employment and related new population.

(b) The Assistant Administrator may periodically review and, if appropriate, revise this formula on the basis of the best available data concerning the need for public facilities and services created by coastal energy activity. However before making any revisions in the formula the Assistant Administrator will submit any proposed changes to all eligible coastal States for comment.

§ 931.47 Allotment of credit assistance.

(a) *State review.* (1) It is the intent of the Assistant Administrator to provide to each eligible coastal State thirty (30) days before the beginning of each fiscal year for which funds under section 308(d)(1) have been appropriated the following information:

(i) The inventory of coastal energy activity described in § 931.45 on which the allotment of appropriated funds will be based;

(ii) Data on new employment and related new population for each activity on the credit assistance inventory;

(iii) The allotment formula described in § 931.46; and

(iv) A description of the procedures for computing the allotment.

(2) Eligible coastal States will have 30 days to submit comments on this information to the Assistant Administrator who will revise the inventory, employment and population data, formula, and allotment computations as appropriate.

(3) Final allotments will be calculated no more than 30 days after the end of the 30-day State review period.

(b) *Allotment computation.* After the State review described in paragraph (a) of this section a public facility and public serviced need equivalency will be calculated for each activity shown on the credit assistance inventory by applying the allotment formula to each such activity. A State's need factor will be the sum of the need factors for all activities on that State's credit inventory. A State's allotment of credit assistance will equal the product of:

(1) The amount appropriated under section 308(d) (1) and (2); and

(2) The ratio of that State's public facility and public service need equivalency to the sum of the public facility and public service need equivalencies of all States.

§ 931.48 Recall and reversion of allotted credit assistance.

(a) This section applies only to credit assistance allotted under § 931.47.

(b) Allotted credit assistance may be recalled by the Assistant Administrator 30 days after notification of the State agency designated in § 931.25(a)(4).

(1) No credit assistance will be recalled before July 1 of the fiscal year in which the credit assistance was allotted.

(2) Allotted credit assistance for which an application or request for extension is submitted before July 1 will remain available to the State until award or the application is withdrawn or disapproved.

(3) The time for submitting applications will not be extended beyond January 1 of the following fiscal year.

(4) Allotted credit assistance for which timely applications have been disapproved or withdrawn will remain available to the State for reapplication for 90 days after the disapproval or withdrawal without regard to any limitations on the submission of applications established by this section.

(c) A request for extension must contain:

(1) The name of the expected applicant for the credit assistance;

(2) The use to which the assistance would be put;

(3) The amount of funding to be requested;

(4) The date an application is expected to be submitted; and

(5) An explanation of how the project is required as a result of coastal energy activity.

(d) Allotted funds for which neither an application nor a request for extension is received by the end of the fiscal year in which such funds were allotted will revert to the Assistant Administrator at the end of that fiscal year.

§ 931.49 Application for recalled or reverted credit assistance.

(a) Funds recalled by or reverted to the Assistant Administrator under § 931.48 will be available to all eligible coastal States by application according to the procedures of this section.

(b) Coastal States may submit applications for loans at any time.

(c) Priority among loan applications will be based on the priority in submitting a completed application.

(d) Under exceptional circumstances the Assistant Administrator may grant priority to a later application on the basis of:

(1) Immediacy of need;

(2) Degree of impact sought to be prevented or mitigated;

(3) Equity of distribution of CEIP credit assistance; and

(4) Availability of other financing, including private sources.

(e) No State will receive more than 50% of the amount available under this section in any fiscal year.

§ 931.50 Application for financial assistance to provide public facilities and services.

(a) Applications for credit assistance under this subpart should be submitted on NOAA Form 36-23. Applications for formula grants should be submitted on NOAA Form 36-25 for construction projects and on NOAA Form 36-26 for nonconstruction projects. Applications should be submitted as soon as allotments of section 308(b) grants and section 308(d) credit assistance are computed.

(b) It is the intent of the Assistant Administrator to process completed applications within 45 days of receipt unless an EIS for the proposed project is required.

(c) All applications for assistance under this subpart must contain the following:

(1) A certification by the State agency designated under § 931.25(a)(4)(ii) that the assistance has been or will be allocated within the State in accord with the intrastate allocation process described in Subpart J of this part;

(2) A certification by the State agency designated under § 931.25(a)(4)(iii) that the assistance will be used in a manner that is compatible with the State's developing, or consistent with the State's approved, coastal zone management program;

(3) For construction projects, as defined in Office of Management and Budget Circular A-102, the following:

(i) Environmental impact assessment data in sufficient detail to allow the Assistant Administrator to determine whether an EIS will be required under NEPA;

(ii) Copies of all necessary Federal, State and local permit or license applications or approvals;

(iii) A map showing the project in relation to the coastal zone; and

(iv) A Preliminary Engineering Report.

(d) In addition to the certifications and information described in paragraph (c) of this section applications for credit assistance must contain the following information:

(1) A description of the coastal energy activity, the impacts that are sought to be prevented or mitigated, and the proposed public facility or public service in sufficient detail to allow the Assistant Administrator to verify that the proposed public facility or service is required as a result of coastal energy activity.

(2) An estimate of current levels of utilization of public facilities and public services in the borrower's jurisdiction similar to those for which credit assistance is sought; and

(3) Appropriate fiscal schedules, including financial and economic information, required to evaluate the payback potential on the request for credit assistance. Such fiscal schedules will include the best available historical data on the revenues and expenditures of the borrower for five years preceding the year of application.

(4) The information contained in the fiscal schedules described in paragraph (b)(3) of this section will be used to negotiate with the borrower the terms and conditions of the loan or guarantee agreements as described in § 931.52(c) and § 931.53(f) and will be used in setting the conditions under which repayment assistance will be available, as incorporated into the terms and conditions of the loan or guarantee agreements.

(e) In addition to the certifications and information described in paragraph (c) of this section applications for formula grants must contain the following:

(1) A description of the OCS energy activity, the impacts sought to be prevented or mitigated, and the proposed public facility or public service in sufficient detail to allow the Assistant Administrator to verify that the proposed public facility or service is required as a result of OCS energy activity;

(2) Assurances that the State will repay to the United States:

(i) Any amount received under section 308(b) that the Assistant Administrator determines was expended or committed by the State for purposes not authorized under this subpart,

(ii) Any amount received under section 308(b) that is not expended or committed before the close of the fiscal year following the fiscal year in which the amount was awarded to the State.

(f) Before awarding any financial assistance under this subpart the Assistant Administrator will determine whether an EIS will be required and prepare an EIS when necessary.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 29584, May 21, 1979, as amended at 48 FR 29137, June 24, 1983]

§ 931.51 Special requirements for section 308(d)(1) loans.

(a) *Interest rate.* The interest rate shall be the current average market yield for outstanding marketable obligations of the United States with remaining periods to maturity comparable to the maturity of such loans. The Assistant Administrator may under special circumstances approve lower interests rates. The Assistant Administrator will provide to all coastal States criteria for determining under what conditions special circumstances will be found. These criteria will be updated periodically.

(b) *Eligibility.* A loan to an otherwise eligible borrower may be made even though the fiscal schedules described in § 931.50(d)(3) or other financial information does not indicate adequate coverage for debt service. Loans may be made under section 308(d)(1) to State agencies established for the purpose of financing public facilities. Such loans shall be subject to such terms and conditions as the Assistant Administrator may prescribe.

(c) *Loan agreements.* Each loan agreement will incorporate in detail the conditions of the loan including repayment assistance described in Subpart F of this part. These conditions will be binding upon the Assistant Administrator and the borrower.

(d) *Repayment schedule.* Each loan agreement will contain a mutually agreed-upon repayment schedule, which will be tailored to the repayment ability of the borrower as indicated in the fiscal schedule described in § 931.50(d)(3) or in other financial information. This repayment schedule will set forth the borrower's annual loan service (principal and interest) payments. The borrower may accelerate payment with no prepayment penalties.

(e) *Maturity of loans.* Loans will be made for a period not to exceed the normal useful life of the project. In no event will a loan be made with a maturity exceeding 30 years from the date of the final loan closing.

(f) *Security.* Loans made under section 308(d)(1) will be secured as determined by the Assistant Administrator and in the manner customary or legally allowed under respective State statute and local government charters and ordinances for projects of the type for which credit assistance is requested. NOAA's interest may be perfected, where appropriate, by a filing under the Uniform Commercial Code as adopted by the subject State, or, in any jurisdiction where the Uniform Commercial Code has not been enacted, by the recording of a mortgage.

(g) *Disbursement of loan funds.* Loan funds may be disbursed on a phased basis. Approval of such loan advances will be made after receipt by the Assistant Administrator of:

(1) A favorable preliminary approving opinion of bond counsel on the validity of the proposed interim and final bond or promissory note and,

(2) Satisfactory evidence of receipt of firm construction, service, and/or supply bids as well as compliance with the other loan conditions required to be fulfilled before disbursement. Advances or partial purchases will ordinarily be made in units of not less than 25 percent spaced so as to enable the borrower to pay incurred costs as they come due. Advances must be deposited in a bank with Federal Deposit Insurance Corporation coverage, and the balances exceeding such coverage must be collaterally secured as provided in 12 U.S.C. 265.

(h) *Interim financing on loan projects.* The terms and conditions of the interim financing are subject to prior approval. Upon request, the borrower will be provided with an appropriate letter of intent to aid the borrower in obtaining interim financing from sources other than the CEIP.

(i) *Bond counsel.* The borrower shall retain bond counsel to represent it in each loan transaction. Such bond counsel must receive the prior approval of the Assistant Administrator.

§ 931.52 Special requirements for section 308(d)(2) Federal guarantees.

(a) *Eligibility.* A borrower's legal debt will be considered eligible for guarantee under this subpart if the Secretary of the Treasury approves such debt and it meets other requirements set forth in section 308(f).

(b) *Taxable obligations.* The interest paid on any obligation which is guaranteed under section 308(d)(2) and which is received by the purchaser of such obligation (or the purchaser's successor in interest) shall be included in gross income for the purposes of chapter 1 of the Internal Revenue Code of 1954.

(c) *Interest subsidy.* The Assistant Administrator may pay out of the Fund, pursuant to the terms of the bond or other evidence of indebtedness, to the coastal State or the unit of general purpose local government issuing an obligation guaranteed under section 308(d)(2) not more than the portion of the interest on such obligation as exceeds the amount of interest that would be due at a comparable rate for loans made under section 308(d)(1) at the time the obligation is guaranteed by the Assistant Administrator.

(d) *Fees for guarantees.* A fee will be levied for providing a Federal guarantee. This fee will be set on the basis of the administrative costs incurred in providing and monitoring such guarantee. The fee may be waived in the event repayment assistance (as described in Subpart F of this part) is required.

(e) *Default procedures and guarantee incontestability.* If a borrower defaults on a bond or other evidence of indebtedness guaranteed under the Fund, the holder of the bond or other evidence of indebtedness may demand, pursuant to the terms of the bond or other evidence of indebtedness, payment from the Assistant Administrator of the principal and accrued interest of the obligation in accord with section 308(f)(5)(B). The validity of such a guarantee shall be considered incontestable, except when the holder of the obligation is guilty of fraud or misrepresentation or was aware of fraud or misrepresentation at the time he purchased the obligation.

(f) *Guarantee agreements.* Each obligation guaranteed under this subpart will entail agreements setting forth in detail the conditions under which the repayment assistance described in Subpart F of this part will be available. These conditions will be binding upon the borrower. In addition, all provisions in the underlying documents for obligations guaranteed under section 308(d)(2) will be subject to the approval and will contain such additional provisions as the Assistant Administrator may require.

(g) *Bond counsel.* The borrower shall retain bond counsel to represent it in each guarantee transaction. Such bond counsel must receive the prior approval of the Assistant Administrator.

Subpart F—Repayment Assistance

§ 931.60 General.

This subpart sets forth objectives, purposes and procedures for awarding various forms of repayment assistance under sections 308(d)(3) and 308(b)(5)(A).

§ 931.61 Objectives.

The objectives of the repayment assistance are to ensure that:

(a) Credit obligations will be modified and tailored according to ability to repay so that defaults can be avoided; and

(b) Net fiscal losses to the States or units of general purpose local government resulting from coastal energy activity will be minimized.

§ 931.62 Definitions.

The term "borrower" refers to an eligible coastal State, a special purpose agency of the State, or a unit of general purpose local government that has been awarded credit assistance under section 308(d)(1) or (d)(2).

§ 931.63 Purposes.

(a) The purpose of repayment assistance under section 308(d)(3)(A) through (C) is to assist a borrower who is temporarily unable to meet scheduled repayments of loans or guaranteed obligations.

(b) The purpose of a repayment grant under section 308(b) is to assist a borrower in meeting scheduled repayments of a guaranteed bond when the remedies of section 308(d)(3)(A) through (C) are inadequate.

(c) The purpose of a repayment grant from a State's allotted credit assistance from the fund under section 308(d)(3)(D) is to assist a borrower in meeting scheduled repayments of a loan or guaranteed obligation when the remedies of section 308(d)(3)(A) through (C) are inadequate and formula grants are not available for that purpose. If the State's allotment is insufficient, a grant will be made from the fund.

§ 931.64 Sources of repayment assistance.

(a) *Primary sources.* The primary sources of repayment assistance are modification of credit assistance terms and conditions under section 308(d)(3)(A), refinancing of a loan under section 308(d)(3)(B), or making a supplemental loan under section 308(d)(3)(C) to enable the borrower to repay principal and interest pursuant to the terms of a loan or guaranteed obligation.

(b) *Secondary sources.* If the borrower is unable to meet scheduled repayments by means of one or more of the primary sources of repayment assistance, and if the inability to repay results from a change in scope of the coastal energy activity or the related new population, the secondary sources of repayment assistance may be used to meet obligations. These secondary sources are the proceeds of the State's allotment of formula grants under section 308(b) and grants from the State's allotment of moneys from the fund under section 308(e)(1), or directly from the fund if the State's allotment is insufficient.

§ 931.65 General eligibility.

(a) A borrower is eligible for repayment assistance only if:

(1) It has been awarded a loan under section 308(d)(1) or a guarantee under section 308(d)(2); and

(2) It has submitted a report, as required under § 931.66, updating the fiscal schedules described in § 931.50(d)(3).

(b) A borrower does not have to be in default before qualifying for repayment assistance. The default of a borrower will nevertheless automatically occasion review for repayment assistance by the Assistant Administrator.

§ 931.66 Reports.

After submitting its original credit assistance application, and until the full repayment of its loan or guaranteed obligation, the borrower shall submit periodically to the Assistant Administrator a report updating the information described in § 931.51(c). The frequency of submission of this report will be established by the Assistant Administrator in consultation with the borrower. This report should contain whatever new information the borrower has received and can document concerning the coastal energy activity and its likely effects on revenues and expenditures.

§ 931.67 Review for repayment assistance.

(a) At the request of the borrower or on the initiative of the Assistant Administrator, a review for repayment assistance will be carried out. Before the initiation of this review by the Assistant Administrator, the borrower must submit a report (described in § 931.66) updating the fiscal schedules described in § 931.50(d)(3). The Assistant Administrator will examine the information and forecasts contained in the report, particularly those relating to the status and effects of the coastal energy activity involved.

(b) All terms and conditions of the loan or guarantee, as enumerated in the loan or guarantee agreements, will remain in effect pending the review for repayment assistance.

(c) Even when the likelihood of eventual repayment assistance seems high, the Assistant Administrator will not normally require that the borrower raise its tax rates above or alter its tax methods from those generally prevailing when the applicant is requesting repayment assistance. However, if the tax base or revenues available to the borrower are reduced for reasons unrelated to the failure of the economic activity connected with energy development, the borrower will be expected to meet its principal and interest payments according to the loan or guarantee.

§ 931.68 Award of repayment assistance.

(a) It is the Assistant Administrator's intent to offer repayment assistance within 45 days after the request for repayment assistance described in § 931.67, if, pursuant to the terms and conditions of the loan or guarantee agreements, the borrower is found unable to meet its annual loan service payment or obligation under a guarantee in accord with its repayment schedule because the economic activity generated by the coastal energy activity and associated facilities have failed to provide adequate revenues.

(b) If the Assistant Administrator finds that any coastal State or unit of general purpose local government which is a borrower is unable to meet its obligations pursuant to a loan made under section 308(d)(1) of the Act because the actual increases in employment and related population resulting from coastal energy activity and the facilities associated with such activity do not provide adequate revenues to enable the State or unit to meet such obligations in accordance with the appropriate repayment schedule, the Assistant Administrator shall, after review of the information submitted by the State or unit pursuant to section 308(e)(3) of the Act, take, subject to the special conditions contained in the loan agreement, any of the following actions:

(1) Modify appropriately the terms and conditions of such loan;

(2) Refinance such loan;

(3) Make a supplemental loan to the State or unit, the proceeds of which shall be applied to the payment of principal and interest due under such loan; and

(4) Make a grant to the State or unit the proceeds of which shall be applied to the payment of principal and interest due under such loan.

(c) When the Assistant Administrator offers one of the courses of action in paragraphs (b)(1) through (4) of this section, the borrower may submit to the Assistant Administrator a formal acceptance of the recommended form of repayment assistance. In the case of a repayment grant from the proceeds of a State's formula grant under section 308(b) for a bond guaranteed under section 308(d)(2), the borrower shall submit this formal acceptance through the State agency designated under § 931.25(a)(4)(i), and the acceptance shall include the adequate assurances required by § 931.50(e)(2). The repayment assistance will take effect as soon as the Assistant Administrator receives the formal acceptance.

(d) If the formula grants allotted the State are insufficient for all the repayment grants recommended by the Assistant Administrator in a fiscal year, the State agency designated under § 931.25(a)(4)(i) shall indicate which bonds it wishes to retire with the proceeds of available formula grants, giving priority to local bonds in accordance with section 308(b)(5)(A). Those borrowers whose bonds the State has indicated it cannot retire with the proceeds of formula grants may request repayment grants from the State's allotment of credit assistance and, when necessary, which may be awarded directly from the fund. Borrowers in States that have no allotted formula grants may request the recommended repayment grants, which will be awarded from the State's allotment of credit assistance and, when necessary, directly from the fund.

(e) If, after the review for repayment assistance, the Assistant Administrator determines that no repayment assistance is warranted, or if the borrower does not formally accept such assistance, the borrower will remain subject to the terms and conditions of the loan or guarantee and to the requirements of Subpart I of this part.

§ 931.69 Appeal procedure.

(a) Whenever a dispute arises concerning the Assistant Administrator's finding made pursuant to § 931.68(a) regarding the existence of conditions which require an offer of repayment assistance the borrower may appeal the Assistant Administrator's decision to the Administrator of NOAA by submitting a request for review to the Office of the Administrator of NOAA.

(b) The Administrator of NOAA will issue a written decision on the appeal within 60 days of the borrower's request for review.

(c) The appeal procedure provided for in paragraphs (a) and (b) of this section is intended to provide a timely and impartial forum for resolving disputes concerning repayment assistance. Such appeal procedures may be initiated by the borrower, but do not expressly or by implication limit the borrower's other remedies at law or in equity. The borrower may seek appropriate judicial relief in a court of competent jurisdiction without the consent of the Assistant Administrator or the Administrator of NOAA, and without first having exhausted the appeal procedures provided in paragraphs (a) and (b) of this section.

Subpart G—Grants for Unavoidable Losses of Valuable Coastal Environmental and Recreational Resources

§ 931.70 General.

This subpart states the objectives of financial assistance under section 308(b) and describes its allowable uses. It also describes procedures for applying for section 308(b) grants.

[47 FR 21025, May 17, 1982]

§ 931.71 Objectives.

The objectives for providing assistance under section 308(b) are:

(a) To help coastal States and units of local government in such States to prevent, reduce or ameliorate losses in the coastal zone of valuable environmental or recreational resources when such losses result from coastal energy activity;

(b) To ensure that the person or persons responsible for these environmental or recreational losses pay for their full cost whenever possible; and

(c) To encourage the prevention of environmental or recreational losses by providing assistance only when the losses cannot be prevented through a reasonable exercise of State or local regulatory authorities.

(d) To help coastal States and units of local government plan for the provision of public facilities and public services required as a result of OCS energy activity.

[44 FR 29584, May 21, 1979, as amended at 47 FR 21025, May 17, 1982]

§ 931.72 Definitions.

(a) The term "valuable environmental resource" refers to any of the following to the extent they are located in a State's coastal zone.

(1) Areas of land or water that are or have been largely in a natural state, or whose value derives primarily from ecological considerations;

(2) Important animal and plant populations and their habitat;

(3) Air, water, or noise quality; or

(4) An area that has been designated under a State's approved coastal zone management program or other regional, State or local plans as an area of particular concern for environmental purposes.

(b) The term "valuable recreational resource" refers to areas of land or water located in a State's coastal zone that have characteristics making them desirable for one or more types of recreational activities, or which have been designated under a State's approved coastal zone management program, or other regional, State or local plans, as areas of particular concern or potential use for recreational, preservation or restoration purposes. Included are areas that have important cultural, historic or archeological significance which are essential to the well being of all citizens.

(c) The term "loss" refers to any damage to, or degradation of, or any threat of damage to, or degradation of, a valuable environmental or recreational resource, including the impairment or threat of impairment of public access to that resource and any degradation, or threat of degradation, of the use of a resource that may result from overcrowding.

(d) A loss of a valuable environmental or recreational resource will be considered "unavoidable" if:

(1) The loss is caused by coastal energy activity; and

(i) The loss cannot be attributed to an identifiable person or persons; or

(ii) The costs of reduction or amelioration of the loss cannot feasibly be directly or indirectly assessed against an identifiable person or persons because no reasonable cause of action exists for the collection of money damages; or

(2) The loss is *projected to occur* as a result of current or future coastal energy activity and funds are sought to design, implement, or administer strategies, or projects to prevent, reduce or ameliorate such loss.

(e) The term "person" means any individual; any corporation, partnership, association, or other entity organized or existing under the laws of any State; the Federal government; any State, regional, or local government; or any entity of any such Federal, State, regional, or local government.

§ 931.73 Eligibility.

(a) To be eligible for assistance under section 308(b), a coastal State must meet the basic eligibility requirements of Subpart C of this part.

(b) A unit of general purpose local government may apply for financial assistance under this subpart from its State.

[44 FR 29584, May 21, 1979, as amended at 47 FR 20125, May 17, 1982]

§ 931.74 Allowable uses.

(a) Assistance is provided in section 308(b)(5)(C) to help States and units of local government design and implement projects to prevent, reduce or ameliorate unavoidable losses to valuable coastal environmental and recreational resources resulting from coastal energy activity including, but not limited to:

(1) Protection restoration, replacement, acquisition or improvement of environmental or recreational resources.

(2) The design and implementation of programs and strategies to prevent, reduce or ameliorate unavoidable environmental and recreational losses, including the cumulative effects of coastal energy activity.

(3) The cost differential between methods of providing a public facility required as a result of coastal energy activity which meets minimum State environmental and construction standards, and a higher cost method that further reduces an environmental loss.

(b) The following are allowable project costs under this subpart to the extent they are reasonable and necessary to prevent, reduce, or ameliorate unavoidable losses to valuable environmental or recreational resources in the coastal zone:

(1) Land acquisition including fee simple, leases, easements, and rights-of-way.

(2) Architectural, engineering, and other technical service fees or costs except that:

(i) Compensation must be comparable to the cost of similar work awarded through open competitive bidding;

(ii) Compensation must not be based on a cost plus a percentage-of-cost; and

(iii) Design and performance standards must conform to professionally recognized National standards.

(3) Construction expenses, including, but not limited to, construction materials, fixtures, appurtenances, and fixed machinery and equipment. However the purchase of movable construction related equipment such as dump trucks and excavating equipment will be allowable only if expressly authorized in the grant or loan agreement;

(4) Site preparation and improvement;

(5) The acquisition of movable equipment essential for the protection, reduction or amelioration of unavoidable losses to valuable coastal environmental or recreational losses.

(c) All awards and expenditures of funds under this subpart are subject to the applicable requirements specified in Subpart I.

(d) Allowable uses under section 308(b)(5)(B) include:

(1) Planning and study that are necessary to provide new or improved public services that are required as a result of OCS energy activity.

(2) Paying for reasonable costs of administering the provision of assistance under section 308 to the extent that

funding for these administrative costs in not available under section 308(c).

[44 FR 29854, May 21, 1979, as amended at 47 FR 21026, May 17, 1982]

§ 931.75 Allotment of section 308(d)(4) environmental and recreational grants.

(a) Funds available in any fiscal year under subsection 308(d)(4) will be allotted among coastal States according to the procedures of this section and will consist of:

(1) Funds appropriated under section 308(d)(4) for that fiscal year;

(2) Funds alloted in previous fiscal years under section 308(d)(4) reverting to the Assistant Administrator under § 931.76;

(3) Funds allotted in previous fiscal years under section 308(d)(4) and recalled under § 931.97 because such funds were expended for unauthorized uses; and

(4) Money from any other source available under section 308(d)(4).

(b) *Allotment computation.* Available funds will be allotted first among those eligible coastal States that do not receive in that fiscal year a section 308(b) formula grant allotment. This allotment will be carried out according to the procedures for allotting credit assistance under § 931.47.

(1) If after the computation of the allotment described in paragraph (b) of this section any State's allotment is less than 5 percent of the amount available that State's allotment will be raised to 5 percent of the amount available.

(2) If after the computation of the allotment described in paragraph (b) of this section any State's allotment is greater than 25 percent of the total amount available then such State's allotment will be reduced to 25 percent of the amount available.

(3) If after the calculations in paragraphs (b)(1) and (2) of this section, the amount that would be required to be allotted exceeds the amount available then each State's allotment will be reduced proportionally until the total allotment equals the amount available.

(4) If after the calculations in paragraphs (b)(1) and (2) of this section, the amount that would be required to be allotted is less than the amount available then such unallotted funds will be available for allotment according to the procedures of § 931.47 among all eligible coastal States.

[44 FR 29584, May 21, 1979; 45 FR 78118, Nov. 25, 1980]

§ 931.76 Reversion of allotted funds.

(a) Allotted funds for which applications are not received by the end of the fiscal year in which such funds were allotted will revert to the Assistant Administrator at the end of such fiscal year.

(b) Allotted funds for which applications are received within the fiscal year in which such funds were allotted will remain available to the State until awarded. Funds for which timely applications are disapproved or withdrawn will remain available for reapplication by the State for 60 days after such disapproval or withdrawal. If a substitute application is not submitted for these funds before the 60-day time period expires such funds will revert to the Assistant Administrator at the end of the fiscal year or at the end of the 60-day period whichever occurs last.

(c) *FY 1978 Funds.* Funds allotted in fiscal year 1978 under section 308(d)(4) will be treated as if allotted in fiscal year 1979 and will be subject to the requirements of this section.

§ 931.77 Applications for environmental and recreational grants.

(a) Application for environmental/recreational grants under this subpart should be submitted on NOAA Form 36-26 for construction projects and on NOAA Form 36-25 for nonconstruction projects. Applications should be submitted as soon as allotments of section 308(b) and section 308(d)(4) funds are computed.

(b) It is the intent of the Assistant Administrator to process completed applications within 45 days of receipt unless an EIS for the proposed project is required.

(c) All applications for assistance under this subpart must contain the following:

(1) A certification by the State agency designated under § 931.25(a)(4)(ii) that the assistance

has been or will be allocated within the State in accord with the intrastate allocation process described in Subpart J of this part;

(2) A certification by the State agency designated under § 931.25(a)(4)(iii) that the assistance will be used in a manner that is compatible with the State's developing, or consistent with the State's approved, coastal zone management program;

(3) A description of the unavoidable environmental or recreational loss, the coastal energy activity causing this loss, and the proposed project in sufficient detail to allow the Assistant Administrator to verify that the proposed project will prevent, reduce, or ameliorate an unavoidable loss of a valuable environmental or recreational resource. The applicant must indicate how the loss is unavoidable as defined in § 931.72.

(4) For construction projects, as defined in the Office of Management and Budget Circular A-102, the following:

(i) Environmental impact assessment data in detail sufficient to allow the Assistant Administrator to determine whether an EIS will be required under NEPA;

(ii) Copies of all necessary Federal, State, and local permit or license applications or approvals;

(iii) A map showing the project in relation to the coastal zone; and

(iv) A Preliminary Engineering Report.

(d) In addition to the certifications and information described in paragraph (c) of this section, applications for formula grants must contain assurances that the State will repay to the United States:

(1) Any amount received under section 308(b) that the Assistant Administrator determines was expended or committed by the State for purposes not authorized under this subpart;

(2) Any amount received under section 308(b) that is not expended or committed before the close of the fiscal year immediately following the fiscal year in which the amount was awarded to the State.

(e) Before awarding any financial assistance under this subpart the Assistant Administrator will determine whether an EIS will be required and prepare an EIS when necessary.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 29584, May 21, 1979, as amended at 48 FR 29137, June 24, 1983]

§ 931.78 Limitations.

The proceeds of grants awarded under sections 308(b) and 308(d)(4) may not be used:

(a) For the prevention, reduction, or amelioration of any loss of an environmental or recreational resource that is directly attributable to the sale, lease, rental, or conversion to other uses of such resource by a State agency or unit of local government when such sale, lease rental or conversion occurred after July 26, 1976;

(b) To pay for that part of the cost of a project designed to prevent, reduce, or ameliorate the loss of a valuable environmental or recreational resource which is incommensurate with the value of the loss;

(c) To pay for that part of the cost of a project designed to prevent, reduce or ameliorate the loss of an environmental resource which can be paid for with funds readily available from any other Federal program.

(d) To pay for that part of a loss:

(1) That occurs after July 26, 1976; and

(2) That could have been prevented by a reasonable exercise of a State's existing regulatory authority.

Subpart H—Lateral Seaward Boundaries

§ 931.80 General.

For the calculations of formula grant allotments under Subpart K, Outer Continental Shelf acreage and production shall be considered adjacent to a particular coastal State if such acreage and production lie on that State's side of the extended lateral seaward boundaries of that State. These extended lateral seaward boundaries of a coastal State shall be determined by delimitation lines established by the Assistant Administrator according to the procedures of this subpart. These delimitation lines are to be established solely for determining a State's adjacency to Outer Continental Shelf acreage and production for the purposes of section 308(b), and they are not intended to have application under any other law or treaty of the United States.

§ 931.81 Establishment of delimitation lines when agreements exist between States.

If a lateral seaward boundary extending to a State's seaward boundary (see the Submerged Lands Act, 43 U.S.C. 1301(b) and 1312) has been clearly defined or fixed by an inter-State compact, agreement, or judicial decision as of July 26, 1976, a delimitation line extending the lateral seaward boundary through the Outer Continental Shelf shall be based on the principles used to delimit or define the lateral seaward boundary in such compact, agreement, or decision. A copy of all such compacts, agreements, or decisions must be submitted to the Assistant Administrator before calculations of State allotments are made. If a portion of a lateral seaward boundary has been clearly defined or fixed by an inter-State compact, agreement or judicial decision as of July 26, 1976, a delimitation line shall be based on the principles used to delimit or define the lateral seaward boundary in such compact, agreement or decision to the extent that such principles are applicable.

§ 931.82 Establishment of delimitation lines when no agreements exist between States.

If no lateral seaward boundary, or any portion thereof, has been clearly defined or fixed by inter-State compact, agreement, or judical decision, a delimitation line extending from the State's seaward boundary through the Outer Continental Shelf shall be established in the following manner:

(a) If, on or before August 4, 1977, a lateral seaward boundary to the State's seaward boundary is delimited or defined by an inter-State compact or agreement, the Assistant Administrator will establish a delimitation line through the Outer Continental Shelf based upon the same principles used to delimit or define the lateral seaward boundary in such compact or agreement. A lateral seaward boundary established by inter-State compact or agreement may be based on any principles which are mutually acceptable to the States involved. When such a boundary requires a measurement from a baseline, that baseline will be as defined in § 931.84(a). The lateral seaward boundary delimited or defined by such a compact or agreement, must be appropriately documented to the Assistant Administrator no later than August 4, 1977. Appropriate documentation shall include data sufficient to define the lateral seaward boundary and may include dimensionally stable base maps, geographical positions, azimuths, computations, and written descriptions.

(b) If a lateral seaward boundary is not defined or delimited by compact or agreement on or before August 4, 1977, delimitation lines will be established by the Assistant Administrator according to the applicable principles of law, including the principles of the Convention on the Territorial Sea and The Contiguous Zone. The Assistant Administrator will extend this time period up to February 4, 1978, if the Governors of the States concerned each request such an extension. The Assistant Administrator also has discretion to extend the time period for other delimitation lines which may be affected by the one for which an extension has been requested. Prior to establishing these delimitation lines, the Assistant Administrator will allow an additional 6-month period during which time the States failing to delimit or define a lateral seaward boundary may submit written arguments in support of their respective positions. After expiration of the period allowed for submission of arguments by States, the Assistant Administrator will establish the required delimitation lines according to the applicable principles of law. The procedures of this paragraph may be invoked at any time after these regulations become effective if the States concerned jointly seek a determination by the Assistant Administrator.

If the lateral seaward boundary is a matter in litigation prior to the time of delimitation by the Assistant Administrator, such delimitation may be deferred by the Assistant Administrator until a final judicial decision is rendered.

(c) If after July 26, 1976, a judical decision is rendered to clearly define or fix a lateral seaward boundary such a decision may be used by the Assistant Administrator in establishing a line of delimitation.

§ 931.83 Establishment of delimitation lines under later compacts or agreements.

If, after February 4, 1977, two or more States enter into or amend an interstate compact or agreement, in order to clearly define or fix a lateral seaward boundary, delimitation lines extending such a boundary through the Outer Continental Shelf will be based on principles used to delimit or define the lateral seaward boundry in such compact or agreement. For the purpose of calculating formula grant allotments under Subpart K, the Assistant Administrator also may accept agreements between States on the proportional sharing of formula grant funds within a specified area, without the need for agreement on a specific line. However, delimitation lines so extended or altered, and allotments so calculated, will not affect grants made previously in accord with calculations under Subpart K.

§ 931.84 Procedures for defining delimitation lines by equidistance principles.

(a) In the event that the Assistant Administrator establishes a line of delimitation based on measurement from a baseline, that baseline will be the intersection of the National Ocean Survey (NOS) low water datum of reference with the land, as described and published by the NOS on large scale nautical charts of the area, as modified by the application of the principles of the Convention on the Territorial Sea and the Contiguous Zone, as interpreted by the Ad Hoc Committee on U.S. Coastline Delimitation. This committee, which has the responsibility to apply principles of international law and the Convention on the Territorial Sea and the Contiguous Zone in delimiting the territorial sea and the contiguous zone of the United States, will be charged with the identification of the baseline, including closing lines, on NOS charts as required to establish the baselines.

(b) If delimitation lines established by the Assistant Administrator are based on a measurement from the baseline, they shall be delineated by the NOS, which shall determine the geographic positions of these points by either graphical or analytical procedures, and document the delimitation lines for review and comment by the above Ad Hoc Committee and final approval by the Assistant Administrator.

§ 931.85 Formula grants impounded for disputed areas.

(a) That portion of a State's allotment of section 308(b) formula grants which is dependent on Outer Continental Shelf acreage and production in disputed areas, as determined by the Assistant Administrator, will be impounded in the Treasury of the United States until such time as the required delimitation lines have been established by the Assistant Administrator using the procedures outlined in § 931.82.

(b) That portion of a State's allotment of section 308(b) formula grants which is dependent on Outer Continental Shelf acreage, production and landings in areas disputed between the Federal Government and the State will be impounded in the Treasury of the United States until such time as the issue is resolved.

Subpart I—General Provisions

§ 931.90 Allowable costs.

(a) Allowable costs will be determined in accord with Federal Management Circular 74-4, Cost Principles Applicable to Grants and Contracts with State and Local Governments (34 CFR Part 255), the grant/loan agreement, and with the unique requirements of the Coastal Energy Impact program. Specifically, project costs must:

(1) Be necessary and reasonable for proper and efficient administration of the program, not be a general expense required to carry out the overall responsibilities of States or units of local governments;

(2) Be authorized or not prohibited under State or local laws or regulations;

(3) Conform to any limitations or exclusions set forth in these principles, Federal laws, or other governing limitations as to types or amounts of cost items;

(4) Be consistent with policies, regulations, and procedures that apply uniformly to both federally assisted and other activities of the unit of government of which the recipient is a part;

(5) Be accorded consistent treatment through application of generally accepted accounting principles appropriate to the circumstances;

(6) Not be allocable to or included as a cost of any other federally financed program in either the current or a prior period; and

(7) Be net of all applicable credits.

(b) The cost of activities conducted, or assets acquired, prior to approval of an assistance application are allowable costs only when specifically provided for in the grant or loan or agreement and to the extent that they meet the requirements set forth in paragraph (a) of this section, OMB Circular A-102 and FMC 74-4. For nonconstruction projects, such costs must have been incurred not more than three months prior to the grant start date. Purchase options for land and materials essential to the project or program may be an allowable project cost.

§ 931.91 Administrative procedures.

Administrative procedures for grants and credit assistance are based to the maximum extent practicable upon the Office of Management and Budget Circulars A-102 "Uniform Administrative Requirements for Grants-in-Aid to State and Local Governments" (34 CFR Part 256).

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[44 FR 29584, May 21, 1979, as amended at 48 FR 29137, June 24, 1983]

§ 931.92 [Reserved]

§ 931.93 Other Federal requirements.

Compliance with all other Federal statutory provisions and regulations which are applicable to Federal assistance programs and recipients of such assistance is a condition of CEIP assistance.

§ 931.94 Environmental review.

Before awarding CEIP financial assistance the Assistant Administrator will consider the environmental consequence of each proposed use of CEIP funds according to the provisions of this section.

(a) For each proposed construction project the Assistant Administrator will conduct an environmental impact assessment pursuant to NEPA and the Council of Environmental Quality Guidelines (40 CFR 1500.1 et seq.) to determine whether an EIS is required except that such an assessment will not be required for minor repair, replacement, maintenance, or improvement projects.

(b) An environmental assessment under NEPA and the CEQ Guidelines will not be required for:

(1) The payment of administrative costs.

(2) Repayment assistance for projects previously funded under the CEIP.

(3) Environmental assessments.

(4) Other nonconstruction projects except that the Assistant Administrator will monitor expenditure for nonconstruction projects to assure that the policies of NEPA are effectively implemented.

(5) Any project that is exempt from environmental review under any other Federal statute or regulation.

(c) All data and information on the environmental impacts of a proposed project will be provided by the potential recipient of assistance under this part, according to the CEIP Environmental Guidelines.

(d) The Assistant Administrator may prepare a regional or programmatic EIS on a group of similar or related projects, if appropriate.

(e) The provisions of financial assistance for construction projects is subject to compliance with the requirements of Executive Orders 11988 (Floodplain Management) and 11990 (Protection of Wetlands) and the requirements for protecting historical and cultural properties established by the Council on Historical reservation (36 CFR Part 880).

§ 931.95 Records.

(a) All initial recipients of financial assistance under section 308 shall keep and preserve, and shall require each unit of local government to which it passes the assistance to keep and preserve, detailed project control records reflecting acquisitions, work progress, expenditures, and commitments, indicating in each instance their relationship to estimated costs and schedules. All recipients shall also keep and preserve such full written financial records, accurately disclosing the amount and the disposition of the assistance, together with the amounts and disposition of other funds applied to the project, program, or other undertaking, as shall adequately establish compliance with the requirements of section 308, the terms and conditions upon which such financial assistance was made, and the standards for financial management systems contained in Attachment G to Office of Management and Budget Circular A-102. Such records shall be retained until:

(1) An audit is completed and all questions arising from it are resolved; or

(2) Three years after completion of the project, program, or other undertaking and submission of the final Financial Status Report, whichever is sooner.

§ 931.96 Audit.

The Assistant Administrator, the Secretary of Commerce, and designee of the Assistant Administrator or Secretary of Commerce, and the Comptroller General of the United States shall have access for purposes of audit and examination to any records, books, documents, and papers which belong to, or are used under this part or controlled by, any recipient of the assistance or any person who entered into any transaction relating to such financial assistance and which is pertinent, for purposes of determining if such financial assistance is being or was used in accordance with section 308, the terms and conditions upon which such financial assistance was made, Office of Management and Budget Circular A-102, and Federal Management Circular 74-4.

§ 931.97 Recovery of funds.

(a) This section sets forth requirements and procedures to ensure that grant proceeds received by States may be recovered by NOAA if such proceeds have been expended or committed for the purposes and activities other than those set forth in the grant award, and if section 308(b) grant proceeds have not been expended or committed by the State before the close of the fiscal year immediately following the fiscal year of project award.

(b) *Procedures for the recovery of funds.* (1) Upon receipt from NOAA of a written request for repayment which contains a finding that the proceeds of a grant received by the State have been expended or committed by the State for purposes other than those set forth in the grant award, and, in the case of 308(b) grant proceeds, if the funds have not been expended or committed before the close of the fiscal year immediately following the fiscal year in which the grant proceeds were awarded, such State shall provide a written response within 15 days to either refute or admit such findings.

(2) NOAA shall make a determination that repayment by the State will or will not be required, and shall notify the State of this determination no later than 45 days from the receipt by the State of the request for repayment described in (b)(1) of this section.

(3) If NOAA determines that repayment is required, the State shall have 30 days from the date of receipt of such determination to file a request for reconsideration with NOAA or 60 days from the date of receipt of such

determination to make a repayment by check in the amount stated in such determination.

(i) If the State's request for reconsideration is denied, the State shall have 15 days from the date of such denial to make a repayment by check in the amount determined to be owed to the United States.

(ii) If, as a result of the State's request for reconsideration, NOAA modifies its determination of the amount required to be repaid by the State, such State shall have 15 days from the date of such modification to make the repayment, if any, by check.

(4) If no repayment is received within the time period established by paragraph (b)(3) of this section, NOAA shall take necessary action to recover the amount due. Methods of recovery may include, but are not limited to:

(i) The modification or termination of a grant being received by such State under section 308(b);

(ii) The modification or termination of financial assistance under sections of the Act other than section 308(b);

(iii) The withholding of future financial assistance to the State under any section of the Act; and

(iv) The modification or termination of financial assistance being received by such State under other programs administered by the Department of Commerce, or the withholding of future financial assistance to such State under these programs.

(5) Actions undertaken under paragraph (b) of this section shall not in any way prejudice any rights of NOAA to pursue such other remedies as may be legally available and appropriate under the circumstances, including the referral of the claim against the State to the Department of Justice.

(c) If a State has received a written request for repayment under § 931.97(b)(1) NOAA may require such additional assurances as it finds necessary to protect the interests of the United States in the making of grants to the State.

§ 931.98 Other sources of Federal funding.

(a) The Assistant Administrator will, to the extent practicable, administer the provision of financial assistance under section 308:

(1) On the basis that section 308 financial assistance will be in addition to and not in lieu of any Federal funds that any coastal State or unit of local government may obtain under any other Federal law; and

(2) To avoid duplication of Federal funds that any coastal State or unit of local government may obtain under any other Federal law.

(b) When assistance from other Federal programs is insufficient to cover a project or when combinations of assistance from multiple Federal programs are appropriate and beneficial, States and units of local government may request joint funding by the CEIP and other Federal programs in accordance with OMB Circular A-111, 41 FR 32040.

(c) The term "joint funding" means the coordination of multiple Federal assistance under the authority and provisions of the Joint Funding Simplification Act of 1974 (Pub. L. 93-510) in support of and consistent with the CEIP.

§ 931.99 Coordination with State coastal zone management agency.

(a) In the event the coastal State is implementing a management program approved under section 306, all applications for financial assistance under section 308 shall be reviewed for consistency with the State's management program by the State agency administering the State's coastal management program in accordance with the requirements of section 307(d).

(b) In the event the coastal State is developing a management program pursuant to section 305 or in a manner consistent with the policies of section 303, all applications for financial assistance under section 308 shall be reviewed for compatibility with the State's developing coastal management program by the State agency developing the management program.

Subpart J—Intrastate Allocation of Financial Assistance

§ 931.110 General.

This subpart sets forth policies, requirements, and criteria required by sections 308(e)(2) and (g)(2) and related to the intrastate allocation of financial assistance provided under section 308.

§ 931.111 Objective.

The objective of these requirements is to assure, to the maximum extent practicable, that section 308 assistance allotted to coastal States is distributed among units of local government in amounts which are proportional to need and in a manner which is equitable and expeditious.

§ 931.112 Intrastate allocation.

Each coastal State must establish a process to allocate its allotted section 308 (b), (c)(1), (d) assistance among State agencies and units of local government based on need for such assistance. This process may be periodically reviewed by the Assistant Administrator to determine whether its application results in a distribution of assistance which, to the maximum extent practicable, is proportional to need. States may amend or modify their intrastate allocation process subject to approval by the Assistant Administrator. The form of the allocation process will depend on the amount of assistance allotted to the State.

(a) States that receive in a fiscal year an allotment of $1 million or more in grants under sections 308 (b), (c)(1) and (d)(4) must develop an intrastate allocation process for that fiscal year's allotment. Such process must be approved by the Assistant Administrator and must:

(1) Indicate the State agency designated under § 931.25 which will assume the lead role for administering the process;

(2) Describe the methods and procedures used to assure direct and effective participation by affected State agencies and units of local Government throughout the development and implementation of the allocation process.

(3) Describe the methods to be used to allocate financial assistance and to evaluate and select projects based on criteria which include immediacy or severity of impacts, the fiscal capacity of units of local Government, and protection of the environment;

(4) Assure that information on the allocation of financial assistance is available to the public throughout the allocation process;

(5) Stipulate reasonable time limits for the allocation of financial assistance; and

(6) Establish a timely procedure by which units of local government may appeal to the State;

(i) The results of its allocation decisions; or

(ii) Whether the State complied with the intrastate allocation process described in this section and approved by the Assistant Administrator.

(b) Those States which receive an allotment of less than $1 million in 308 grants in any fiscal year must provide under sections 308 (b), (c)(1), (d)(4) an allocation process which will be submitted along with applications and requisitions for section 308 assistance. This process will not be subject to prior approval of the Assistant Administrator. The submission by the State must describe:

(1) The methods used to evaluate and select projects and to allocate financial assistance.

(2) The methods used to provide for formal notification of, direct consultation with, and comments by, affected State agencies and units of local government in the allocation of all 308 funds.

(c) Eligible U.S. Territories are exempt from the requirements to provide an intrastate allocation process.

§ 931.113 Forms of assistance.

To the maximum extent practicable and in accord with the intrastate allocation process established pursuant to § 931.112:

(a) States that receive grants under section 308 for purposes specified in Subparts D and G of this part must pass this assistance through to State agencies and units of local government in the form of grants;

(b) States that receive grants under section 308 for purposes specified in Subparts E and F of this part must pass this assistance through to State agencies and units of general purpose local government in the form of grants;

(c) States that are allotted credit assistance under section 308 (d)(1) and (d)(2) must pass this assistance through to State agencies and units of general purpose local government using one of the following methods:

(1) State agencies may borrow to provide public facilities and public services needed to meet either State or local needs;

(2) State agencies may borrow to reloan or to grant this assistance to units of general purpose local government for public facilities and public services needed to meet local needs; or

(3) State agencies and units of general purpose local government may submit applications to the State to borrow from the Fund to provide needed public facilities and public services.

§ 931.114 Appeal to Assistant Administrator.

(a) A unit of local government may appeal to the Assistant Administrator to determine whether the State complied with the approved intrastate allocation process described in § 931.112 and approved by the Assistant Administrator. Such an appeal must be made within 30 days after the unit of local government has exhausted the appeal procedure described in § 931.112. Such an appeal will be limited to the application of the State's process and the Assistant Administrator may require additional information necessary to make an objective review and finding. The Assistant Administrator will notify the State and unit of local government of NOAA's findings within 45 days of the receipt of the appeal.

(b) If the Assistant Administrator finds that the State has not substantially complied with the approved process, section 308 assistance will be withheld until the State reallocates the assistance in accord with the approved process.

Subpart K—Allotment of Section 308(b) Formula Grants

§ 931.120 General.

The purpose of this subpart is to describe the procedure for allotting among eligible coastal States moneys appropriated in any fiscal year under section 308(b).

§ 931.121 Definitions.

(a) The term "first landed" in a particular coastal State refers to oil and natural gas produced from the OCS that is first unloaded from tankers or barges within that state, or is brought to shore in pipelines that first touch non-submerged land and create a significant impact in that State.

(b) The term "adjacent" is defined in § 931.80.

§ 931.122 OCS regions.

For purposes of this subpart in the coastal States will be assigned to OCS regions as follows:

(a) Region I: Connecticut, Delaware, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, South Carolina, the Commonwealth of Puerto Rico, Virginia and the Virgin Islands.

(b) Region II: Alabama, Florida, Louisiana, Mississippi, and Texas.

(c) Region III: California, Hawaii, Oregon, and Washington.

(d) Region IV: Alaska.

§ 931.123 Impacted State.

(a) For purposes of awarding a two percent formula grant allotment the Assistant Administrator will determine that a State "is being or will be impacted by OCS energy activity" if:

(1) The Assistant Administrator finds that a State was impacted by OCS energy activity that took place in the fiscal year preceding the fiscal year for which the allotments are calculated; or

(2) In the Assistant Administrator's judgment that State will be impacted as a result of OCS energy activity that took place in the fiscal year preceding the fiscal year for which the formula grant allotments are calculated.

(b) The projection of impacts that "will" occur necessarily implies that the Assistant Administrator make anticipatory judgments that may not be supported by hard data. The Assistant Administrator will decide which States "will be impacted" within the context of the purposes for which the CEIP was established and will base the analysis of future impacts on the immediacy of impact, equity in distribution of appropriated funds, and the reasonable need for such funds.

(c) The impacts that the Assistant Administrator will consider when making two percent formula grant allotments include, but are not limited to:

(1) Any significant loss, damage, degradation of or impairment of access to any valuable coastal environmental or recreational resource or any threat of such loss, damage, degradation, or impairment;

(2) Any changes or threat of changes in the social, governmental or economic infrastructure in the coastal zone which would necessitate the provision of new or improved public facilities or public services; or

(3) Any demographic changes or threat of change in the coastal zone which would necessitate the provision of new or improved public facilities or public services or which would degrade the quality of the human environment.

§ 931.124 Eligibility.

No coastal State will receive an allotment of section 308(b) formula grants unless it meets the basic eligibility requirements of Subpart C.

§ 931.125 Allotment of section 308(b) formula grants.

(a) Funds available under section 308(b) will be allotted according to the procedures specified in this section and will consist of:

(1) Funds appropriated under section 308(b) in a fiscal year; and

(2) Funds available in a fiscal year under section 308(b) from any other sources.

(b) *State review.* (1) Tentative allotments of formula grants will be computed and submitted to all eligible coastal States as soon as practicable after OCS acres leased, OCS oil and gas produced, and OCS oil and gas first landed data become available for the fiscal year preceding the year for which allotments are calculated. These data usually become available in November of the fiscal year for which allotments are calculated.

(2) Eligible coastal States will have 30 days to submit comments on these tentative allotments to the Assistant Administrator who will revise the allotments as appropriate.

(3) Final allotments will be calculated no more than 30 days after the end of the 30-day State review period.

(c) The allotment of section 308(b) formula grants that a State receives will be the result of the calculations in paragraphs (c)(1) through (5) of this section.

(1) *Formula amount.* The amount allotted to an eligible coastal State in a fiscal year under the formula specified in section 308(b)(2) is the formula amount and is given by the following equation:

$$\text{Formula amount} = \tfrac{1}{2}\ \frac{A}{A_T} \times TA + \tfrac{1}{4}\ \frac{P}{P_T} \times TA + \tfrac{1}{4}\ \frac{L}{L_T} \times TA$$

A = The amount of OCS acreage that is adjacent to the eligible coastal State and is newly leased by the Federal government in the fiscal year preceding the fiscal year for which the allotment is made.

A_T = The total amount of OCS acreage that is adjacent to all eligible coastal States and is newly leased by the Federal government in the preceding fiscal year.

P = The volume of oil and natural gas produced from OCS acreage adjacent to the eligible coastal State in the preceding fiscal year.

P_T = The total volume of oil and natural gas produced from OCS acreage adjacent to all eligible coastal States in the preceding fiscal year.

L = The volume of oil and natural gas produced from OCS acreage that is first landed in the State in the preceding fiscal year.

L_T=The total volume of oil and natural gas produced from the OCS that is first landed in all eligible coastal States in the preceding fiscal year.

TA=The total amount of funds available for section 308(b) purposes in the fiscal year for which the allotment is made.

(2) *Two percent amount.* The Assistant Administrator will allot to any eligible coastal State in a fiscal year an amount equal to 2% of the total amount available in that fiscal year under section 308(b) if:

(i) That State's formula amount is greater than zero but less than 2 percent of the total amount available in such fiscal year; or

(ii) That State's formula amount is zero; and

(A) The Assistant Administrator determines that State is being or will be mpacted by OCS energy activity; and

(B) The Assistant Administrator determines that State will be able to xpend or commit the proceeds of uch allotment in accordance with the urposes set forth in section 308(b)(5); nd

(C) Any other eligible coastal State n the same OCS region is allotted a ormula amount greater than zero.

(3) *Proportional reduction.* If after alculating the formula amount and ne 2 percent amount the total mount of funds that would be reuired to be allotted is greater than ne total funds available in a fiscal ear under section 308(b), the Assistnt Administrator will deduct from ach coastal State whose formula mount exceeds 2 percent of the mount available an amount reprented by the following expression:

$$T-TA) \times \frac{F - 2\% \text{ of } TA}{SF - (2\% \text{ of } TA \times S)}$$

=Total amount that would be required to be allotted to all coastal States before the proportional reduction.

A=Total amount available under section 308(b).

=Formula amount for that State.

F=Sum of the formula amounts that exceeds 2 percent of the amount available.

=Number of States where formula amount exceed 2 percent.

(4) *Maximum amount.* If after the lculations performed in paragraphs (c)(1) and (3) of this section any coastal State would receive an allotment that is greater than 37½ percent of the amount available, the Assistant Administrator shall reduce the allotment of that State to 37½ percent of the amount available.

(5) *Redistribution.* Any amount not allotted by virtue of application of paragraph (c)(4) of this section will be reallotted proportionally among those coastal States that at this point in the calculation receive an allotment greater than 2 percent but less than 37½ percent of the amount available. For purposes of this paragraph "reallotted proportionally" means allotment in accordance with the provisions of paragraph (c)(1) of this section except that only those States that receive an allotment greater than 2 percent and less than 37½ percent will participate in the calculations described in that paragraph.

[44 FR 29584, May 21, 1979; 44 FR 31011, May 30, 1979]

§ 931.126 Recall of formula grants.

(a) Except as provided in Subpart C, funds allotted under this subpart will remain available for application by the recipient coastal State until September 30, 1988. Funds not applied for by this date will be returned to the United States Treasury.

(b) Funds allotted under this subpart and which have been awarded to a State must be expended or committed by the State by the end of the fiscal year immediately following the fiscal year in which such funds were awarded or be subject to recovery under § 931.97.

(c) If an application for which funds have been committed by a State is withdrawn either within sixty (60) days before the end of the fiscal year that follows the fiscal year in which the funds were awarded to the State, or anytime after the end of the fiscal year that follows the fiscal year in which the funds were awarded to the State, the State will have sixty (60) days to resubmit an application for these funds. If a substitute application is not submitted within this time period the funds will be subject to recovery under § 931.97. Funds recovered under this section and § 931.97 will be reallotted among eligible coastal States as soon as practicable.

[44 FR 31011, May 30, 1979]

PART 932—COASTAL ZONE MANAGEMENT INTERSTATE GRANTS

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AUTHORITY: Sec. 309, Coastal Zone Management Act of 1972. (Pub. L. 92-583, 86 Stat. 1280, as amended by Pub. L. 94-370, 90 Stat. 1013).

SOURCE: 42 FR 19854, Apr. 15, 1977, unless otherwise noted.

Subpart A—General

§ 932.1 Basic purposes.

(a) This section establishes the basic purposes for which interstate grants pursuant to subsections 309(a) and 309(d) of the Act may be awarded. The basic intent of interstate grants under these subsections is to provide support for cooperative interstate and regional efforts on the part of coastal states during the program development phase undertaken pursuant to section 305 of the Act and/on the program administration phase undertaken pursuant to section 306 of the Act. Cooperative efforts may consist of coordinating coastal zone planning, policies, and programs; and/or studying, planning and implementing compatible coastal zone policies. These cooperative efforts may also consists of establishment of effective mechanisms, including especially State-Federal consultation procedures, for the identification, examination and cooperative resolution of mutual problems with respect to marine and coastal areas affecting the applicable coastal zone.

(b) *Comment.* Statutory Citation, subsection 309(a):

> The coastal states are encouraged to give high priority—
>
> (1) To coordinating state coastal zone planning, policies, and programs with respect to contiguous areas of such states; and
>
> (2) To studying, planning, and implementing unified coastal zone policies with respect to such areas * * *

(c) *Comment.* Statutory Citation, subsection 309(b):

> The consent of the Congress is hereby given two or more coastal states to negotiate, and to enter into, agreements or compacts, which do not conflict with any law or treaty of the United States, for—
>
> (1) Developing and administering coordinated coastal zone planning, policies and programs pursuant to sections 305 and 306; and
>
> (2) Establishing executive instrumentalities or agencies which such states deem desirable for the effective implementation of such agreements or compacts * * *

(d) *Comment.* Statutory Citation, subsection 309(d):

> If no applicable interstate agreement or compact exists, the Secretary may coordinate coastal zone activities described in subsection (a) and may make grants to assist any group of two or more coastal states to create and maintain a temporary planning and coordinating entity to—
>
> (1) Coordinate state coastal zone planning, policies, and programs with respect to contiguous areas of the states involved;
>
> (2) Study, plan, and implement unified coastal zone policies with respect to such areas; and
>
> (3) Establish an effective mechanism, and adopt a Federal-State consultation procedure, for the identification, examination,

and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone * * *

§ 932.2 Definitions.

(a) The term "Act" means the Coastal Zone Management Act of 1972, as amended.

(b) The term "Secretary" means the Secretary of Commerce or his/her designee. Delegations of authority from the Secretary to the Administrator, National Oceanic and Atmospheric Administration, have been duly executed by Amendment 5 of Department of Commerce Organization Order 25-5A, dated October 13, 1976; and from the Administrator to the Associate Administrator for Coastal Zone Management, by NOAA Circular 76-82, effective October 13, 1976.

(c) The term "Associate Administrator" means the Associate Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

(d) The term "contiguous areas" means those land or water areas in or affecting the coastal zone of two or more states which collectively constitute an interrelated ecological, economic, social, or administrative unit for the purposes for which an interstate grant is sought. Areas will be considered contiguous if they involve or affect the coastal zones of any of the following groups of states, or any subgroups thereof:

(1) Pacific States including California, Oregon, Washington, Alaska, Hawaii, Guam and/or American Samoa;

(2) Great Lakes States including Michigan, Minnesota, Wisconsin, Ohio, Illinois, Indiana, New York and/or Pennsylvania;

(3) New England States including Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut and/or New York;

(4) Mid-Atlantic States including Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland and/or Virginia;

(5) South Atlantic States including Virginia, North Carolina, South Carolina, Georgia, and/or Florida; and

(6) Gulf States including Florida, Alabama, Mississippi, Louisiana, Texas, Puerto Rico and/or the U.S. Virgin Islands.

(e) The term "marine and coastal areas" means the State's defined coastal zone including waters (and lands thereunder) within a State's territorial limit as well as waters (and lands thereunder) beyond this territorial limit but within the extended lateral seaward boundaries of States as determined pursuant to subsection 308(b)(3)(B) of the Act.

(f) The term "temporary" means either the duration of a particular project in which case "temporary" means one year, or the life of a particular entity which may be created for purposes of receiving grants under section 309 of the Act, in which case "temporary" means no longer than September 30, 1980, which is the expiration date for authorizations under this section, pursuant to subsection 318(a)(4) of the Act.

§ 932.3 Use of grants.

(a) Pursuant to subsections 309(a) and 309(d) of the Act, the Associate Administrator will consider for funding any cooperative effort involving contiguous areas of two or more States if the purposes of such cooperative effort are consistent with section 305 or 306 of the Act and are designed specifically to:

(1) Coordinate State coastal zone planning, policies and programs with respect to contiguous areas of such States; and/or

(2) Study, plan and/or implement compatible coastal zone policies with respect to such contiguous areas; and/or

(3) Establish effective mechanisms for the identification, examination and/or cooperative resolution of mutual problems with respect to marine and coastal areas which affect, directly or indirectly, the applicable coastal zone. Particular consideration should be given to establishment of State-Federal consultation procedures.

(b) The Associate Administrator will deem an interstate cooperative effort to be consistent with section 305 or 306 of the Act if the activities proposed are related to or derived from goals, objectives, mutual issues, problems, and/or needs identified by one or more States in their approved section 306 management programs or their program development or program implementation work programs funded pursuant to section 305 or section 306 respectively.

(c) Specific work activities in any interstate cooperative effort funded pursuant to section 309 of the Act may include, but are not limited to:

(1) Collection and analysis of data;

(2) Preparation and dissemination of reports and position papers;

(3) Development of agreements with individual Federal agencies, including regional offices of these agencies;

(4) Establishment of interstate agreements or compacts pursuant to subsection 309(b) of the Act; and

(5) Holding of workshops and similar, necessary meetings or conferences.

(d) The Associate Administrator will not consider funding activities under this section of the Act which could be funded more appropriately under section 308 or section 310 of the Act.

(e) The Associate Administrator will not consider funding under section 309 of the Act any work activity which will be performed by an interstate entity on behalf of only a single coastal state. This prohibition on the use of section 309 grants does not preclude a state from exercising its option pursuant to subsections 305(g) and 306(f) of the Act to allocate, with the approval of the Associate Administrator, portions of its grant to any interstate agency for carrying out approved work program activities.

Subpart B—Eligible Entities

§ 932.10 General.

(a) The Associate Administrator will consider an applicant eligible for a grant under section 309 of the Act if the applicant meets the criteria listed in § 932.11 and if the applicant and the proposed grant activities have the explicit, written support of the state management agencies designated pursuant to § 920.52 or § 923.33 of this chapter. The content of what must be in this written support is contained in § 932.42.

(b) Applications will be considered from more than a single interstate or bistate entity in a particular region (as listed in § 932.2(d)), depending on the nature of the issues to be addressed, the qualifications of entities to address those issues, and the nature and number of states affected by the applications.

§ 932.11 Eligible entities.

(a) The Associate Administrator will consider any of the following to be eligible entities for the purpose of applying for grants pursuant to subsection 309(a) or 309(d) of the Act:

(1) An executive instrumentality or agency established by an interstate agreement or compact pursuant to subsection 309(b);

(2) A temporary plannning and coordinating entity created by two or more States in a region, with the concurrence of the Associate Administrator, to serve the purposes of subsection 309(d);

(3) An existing regional, interstate entity designated by the States involved, and with the concurrence of the Associate Administrator, to address issues identified in § 932.3; or

(4) A coastal State funded pursuant to section 305 or section 306 of the Act, and with the concurrence of the Associate Administrator, acting on its own behalf and that of one or more other States in a particular region.

§ 932.12 Funding priorities among entities.

(a) Higher funding priority will be given to interstate entities which contain a State-Federal consultation procedure for the indentification, examination, and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone.

(b) *Comment.* Statutory Citation, subsection 309(c):

> Each executive instrumentality or agency which is established by an interstate agreement or compact pursuant to this section is encouraged to adopt a Federal-State consultation procedure for the identification, examination, and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone.

(c) *Comment.* Statutory Citation, subsection 309(d)(3):

> If no applicable interstate agreement or compact exists, The Secretary may * * * make grants to assist any group of two or more coastal states to create and maintain a temporary planning and coordinating entity to * * * establish an effective mechanism, and adopt a Federal-State consultation procedure, for the identification, examination, and cooperative resolution of mutual problems with respect to the marine and coastal areas which affect, directly or indirectly, the applicable coastal zone.

(d) Existing interstate entities will be given funding priority over temporary entities created pursuant to subsection 309(d) of the Act, where such existing entities can be demonstrated to have the capability or working experience necessary to accomplish the proposed purpose(s) for which the temporary entity would be created.

Subpart C—Review/Approval Procedures

§ 932.20 General.

(a) This section establishes the procedures by which the Associate Administrator will accept and review grant applications pursuant to subsection 309(a) or 309(d) of the Act. These procedures will include presubmission consultation on the part of the applicant with the Associate Administrator, followed by a formal submission by the applicant, and a formal review by the Associate Administrator.

§ 932.21 Presubmission consultation.

(a) States or interstate entities which have identified problems or needs requiring interstate corrdination are expected to consult with the Associate Administrator prior to the formulation of a formal application for a section 309 grant. The purpose of such consultation will be to determine whether the proposed interstate effort will be consistent with the purposes of section 305 or 306 of the Act, and with the affected States' developing or approved coastal management programs. Such consultation also will facilitate the early determination of the eligibility of the proposed entity and proposed work items. Further, if Federal agencies are to be involved, such consultation also will enable the Associate Administrator to assist States in securing early participation by these Federal agencies in defining mutual problems to be resolved and in determining the procedure to be used for State-Federal consultation.

(1) Where presubmission consultation is initiated by an entity other than the States, that entity should demonstrate evidence of support by the designated coastal management agencies of those States which may be expected to be involved in or affected by the proposed application. At the presubmission consultation stage, evidence of support need not consist of the written documentation, pursuant to § 932.42, required for a formal application.

§ 932.22 Formal submission and review.

(a) After presubmission consultation, a formal application may be submitted by any entity which has been deemed by the Associate Administrator to be an eligible applicant.

(1) A formal submission will contain the information required pursuant to § 932.42. In no case will the Associate Administrator consider an application unless it contains the documentation specified in § 932.42 with respect to States' review and concurrence.

(b) Upon receipt of a formal grant application, the Associate Administrator will initiate an evaluation of the proposal in terms of both programmatic and budgetary considerations.

(1) If the proposal requires the involvement of one or a number of Federal agencies, that proposal will be forwarded to the referenced agency (agencies) for their review and comment within thirty days from receipt of the proposal from the Associate Administrator.

(c) The Associate Administrator will award a grant pursuant to section 309 of the Act assuming availability of funds, if the application:

(1) Is consistent with the purposes and uses of Section 309 grants contained in §§ 932.1 and 932.3;

(2) Meets the financial and budgetary requirements contained in § 932.42; and

(3) Is concurred with by affected Federal agencies, only when their participation is essential to accomplishing the proposed work program. Otherwise, Federal agency concurrence is not necessary for the Associate Administrator to approve an interstate grant.

Subpart D—Permanent Interstate Coastal Management Compacts or Agreements

§ 932.30 General.

(a) Subsection 309(b) of the Act establishes prior Congressional consent for two or more coastal States to negotiate and enter into agreements or compacts for certain purposes related to coastal management, provided these compacts or agreements do not conflict with any law or treaty of the United States. This subpart establishes the procedure by which the Associate Administrator will review such compacts or agreements, prior to their ratification, to insure that there is no conflict with U.S. laws or treaties.

§ 932.31 Review by NOAA for nonconflict with laws or treaties of the United States.

(a) Pursuant to subsection 309(b) of the Act, two or more coastal States may enter into agreements or compacts for the following two broad purposes:

(1) Development and administration of coordinated coastal zone planning, policies and programs pursuant to sections 305 and 306 of the Act (i.e., supportive of State coastal management program development or implementation); and

(2) Establishment of executive instrumentalities or agencies which two or more States deem desirable for effective implementation of such agreements or compacts.

(b) Prior Congressional approval is given for such compacts or agreements provided they do not conflict with laws or treaties of the United States. To insure that States do not expend time and money unnecessarily in negotiating and entering into compacts or agreements that may conflict with existing United States laws or treaties, it is recommended that, prior to final ratification of a subject compact or agreement, the relevant document be submitted to the Associate Administrator. The Associate Administrator will undertake a review of the proposed agreement or compact, in consultation with the Department of Justice and with other Federal agencies as appropriate. In order to expedite this review, States are advised to submit relevant documents to the Associate Administrator as early in the negotiation process as is reasonably possible.

(c) *Comment.* Statutory Citation, subsection 309(b):

> The consent of Congress is hereby given to two or more coastal states to negotiate, and to enter into, agreements or compacts, which do not conflict with any law or treaty of the United States * * *. Such agreements or compacts shall be binding and obligatory upon any state or party thereto without further approval by Congress.

§ 932.32 Federal consultation procedures.

(a) Where a State-Federal consultation procedure is adopted pursuant to subsection 309(c) of the Act, the participation of the following, ex officio, shall be included:

(1) The Associate Administrator;

(2) The Secretary of the Interior;

(3) The Chairman of the Council on Environmental Quality;

(4) The Administrator of the Environmental Protection Agency;

(5) The Secretary of the department in which the Coast Guard is operating;

(6) The Administrator of the Federal Energy Administration; or

(7) Their designated representative.

(b) The Associate Administrator encourages the inclusion and participation of other Federal agencies, as appropriate, in this consultation procedure.

(c) *Comment.* Statutory Citation, subsection 309(c):

> * * * The Secretary of the Interior, the Chairman of the Council on environmental Quality, the Administrator of the Environmental Protection Agency, the Secretary of the department in which the Coast Guard is operating, and the Administrator of the Federal Energy Administration or their designated representatives shall participate ex officio on behalf of the Federal Government whenever any such Federal-State con-

sultation is requested by such an instrumentality or agency.

Subpart E—Application for Interstate Grants

§ 932.40 General.

(a) The purpose of this this section is to define the procedures by which grantees apply for and administer grants under section 309 of the Act and to provide guidelines regarding the content of applications for interstate grants. These procedures shall be used and interpreted in conjunction with the Grants Management Manual for Grants under the Coastal Zone Management Act, hereinafter referred to as the "Manual." The Manual incorporates a wide range of Federal requirements, including those established by the Office of Management and Budget, the General Services Administration, the Department of the Treasury, the General Accounting Office, and the Department of Commerce.

(b) Grants shall not exceed ninety percent of the total cost of the interstate project proposed in the grant request. Federal funds received from other sources cannot be used to match section 309 grants. Match provided by the applicant may consist of cash or in-kind services as provided in the Manual.

(c) *Comment.* Statutory Citation, subsection 309(a)(2);

> * * * Such coordination, study, planning, and implementation may be conducted pursuant to interstate agreements or compacts. The Secretary may make grants annually, in amounts not to exceed 90 per centum of the cost of such coordination, study, or implementation, if the Secretary finds that the proceeds of such grants will be used for purposes consistent with sections 305 and 306.

(d) *Comment.* Statutory Citation, subsection 309(d)(3):

> * * * The amount of such grants shall not exceed 90 per centum of the cost of creating and maintaining such (a temporary planning and coordinating) entity.

(e) Costs claimed as charges to the grant project must be beneficial and necessary to the objectives of the grant project. As used herein the terms costs and grant project pertain to both the Federal grant and the matching share. The allowability of costs will be determined in accordance with the provisions of the General Services Administration Federal Management Circular 74-4: Cost Principles Applicable to Grants and Contracts with State and Local Governments.

§ 932.41 Applicant responsibility.

(a) The application will designate the entity to receive and administer grants pursuant to section 309 of the Act. The applicant must be legally and administratively capable of receiving and administering such grants.

(b) The grantee will be administratively and fiscally responsible for all aspects of the grant, including any subcontracts made by the grantee.

§ 932.42 Application procedure.

(a) All applications are subject to the provisions of E.O. 12372.

(b) All applications shall contain documentation signed by the head of the designated State agencies for coastal management program development or program administration designated pursuant to §§ 920.52 and 923.33 of this chapter respectively of the affected States and, where required by State law or interstate agreement, by the Governors of those States, that the designated State agency:

(1) Has reviewed the application and finds the purposes for which the grant will be used are consistent with developing or approved coastal management programs;

(2) Has reviewed the application and supports the proposed work program;

(3) Has reviewed the capabilities and functions of the applicant entity and supports that entity for purposes of carrying out the activities described in the application; and

(4) Where the applicant is an entity established pursuant to subsection 309(b) of the Act, the application will contain a copy of the compact or agreement, pursuant to which the entity was created, and documentation that the compact or agreement does not conflict with any law or treaty of the United States. The copy of the compact or agreement and the documentation shall be required only upon

initial application for a section 309 grant and will not be required for subsequent applications from the same entity.

(c) The form SF-424, Application for Federal Assistance (Non-Construction Programs), constitutes the formal application and must be submitted 60 days prior to the desired grant beginning date. The application must be accompanied by evidence of compliance with requirements of E.O. 12372, including the resolution of any problems raised about the proposed project. The Associate Administrator will not accept applications that are substantially deficient in adherence to either E.O. 12372 requirements or the documentation required pursuant to paragraph (b) of this section.

(d) In Part IV, the Program Narrative, the applicant shall respond to the following requirements:

(1) A clear description of the contiguous areas on which the cooperative effort will focus, including a listing of the States' involved in and/or affected by the cooperative effort;

(2) A general discussion of the purposes for which the interstate grant will be used, including the relationship of grant activities to the developing or approved coastal management programs of affected States;

(3) A discussion of the anticipated results of the proposed cooperative effort, including how these results may be expected to affect or be integrated into the coastal management program of affected States;

(4) A description of the work program to be undertaken during the grant period. This work program will include:

(i) A precise description of each major task to be undertaken, how it will be accomplished, and by whom it will be accomplished;

(ii) For each task, identify any "Other Entities," as defined in the Manual, that will be allocated responsibility for carrying out all or portions of the task, and indicate the estimated cost of any subcontract for each allocation. Identify, if any, that portion of the task that will be carried out under contract with consultants and indicate the estimated cost of such contract(s); and

(iii) For each task indicate the estimated total cost. Also indicate the estimated total months of effort, if any, allocated to the task from the applicant's staff.

(e) The sum of all tasks in paragraph (d)(4) of this section should equal the total estimated grant project cost.

(f) Using two categories, Professional and Clerical, indicate the total number of personnel in each category on the applicant's staff that will be assigned to the grant project. Also, indicate the number assigned full-time and the number assigned less than full-time in the two categories. Additionally, indicate the number of new positions created in the two categories as a result of the grant project. Indicate total personnel costs.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[42 FR 19854, Apr. 15, 1977, as amended at 48 FR 29137, June 24, 1983]

§ 932.43 Approval of applications.

(a) An application for an interstate grant which complies with the policies and requirements of the Act and the guidance contained in this subpart may be approved by the Associate Administrator, assuming available funding.

(b) Should an application be found deficient, the Associate Administrator will notify the applicant in writing as to the manner in which the application fails to conform to the requirements of the Act or this subpart. Conferences may be held on these matters. Corrections or adjustments to the application will provide the basis for resubmittal of the application for further consideration and review.

(c) The Associate Administrator may, upon finding extenuating circumstances relating to applications for interstate grants, waive appropriate administrative requirements contained herein.

§ 932.44 Amendments.

Amendments to an approved application must be submitted to and approved by the Associate Administrator prior to initiation of the contemplated change. Requests for substantial changes should be discussed with the Associate Administrator well in advance. While all amendments must be approved in writing by the NOAA Grants Officer, approval may be presumed for minor amendments if the grantee has not been notified of objections within 30 working days of date of postmark of the request.

PART 933—COASTAL ZONE MANAGEMENT RESEARCH AND TECHNICAL ASSISTANCE

Subpart A—General

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933.44 Amendments.
933.45 Copies of products.

AUTHORITY: Sec. 310, Coastal Zone Management Act of 1972 (Pub. L. 92-583, 86 Stat. 1280, as amended by Pub. L. 94-370, 90 Stat. 1013).

SOURCE: 42 FR 38738, July 29, 1977, unless otherwise noted.

Subpart A—General

§ 933.1 Basic purposes.

(a) This section sets forth the basic purposes for which the national research and technical assistance program, pursuant to subsection 310(a) of the Act, will be operated, and for which State research and technical assistance grants, pursuant to subsection 310(b) of the Act, will be awarded. The basic intent of both subsections is to fund research, study, and training which supports the development and administration of State coastal zone management programs. However, there is a significance difference in focus between the two subsections in that State grants pursuant to subsection 310(b) will be awarded to State coastal zone development or management agencies for the purpose of meeting State-specific research, study and training needs, while the national program pursuant to subsection 310(a) will work with a variety of entities and will endeavor to address needs which are regional or national in scope.

(b) *Comment.* Statutory citation, subsection 310(a):

> The Secretary may conduct a program of research, study, and training to support the developent and implementation of management programs. * * * The Secretary may enter into contracts or other arrangements with any qualified person for the purposes of carrying out this subsection.

(c) *Comment.* Statutory citation, subsection 310(b):

> The Secretary may make grants to coastal states to assist such states in carrying out research, studies, and training required with respect to coastal zone management.

§ 933.2 Definitions.

(a) The term "Act" means the Coastal Zone Management Act or 1972, as amended.

(b) The term "Secretary" means the Secretary of Commerce or his/her designee. Delegations of authority from the Secretary to the Administrator, National Oceanic and Atmospheric Administration (NOAA), have been duly executed by Amendment 5 of Department of Commerce Organization Order 25-5A, dated October 13, 1976, and from the Administrator to the Associate Administrator for Coastal Zone Management, by NOAA Circular 76-82, effective October 13, 1976.

(c) The term "Associate Administrator" means the Associate Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

(d) The term "person" is as defined in subsection 304(13) of the Act and means "any individual; any corporation, partnership, association, or other entity organized or existing under the laws or any state, regional, or local government; or any entity of any such Federal, State, regional, or local government."

Subpart B—National Research and Technical Assistance Program

§ 933.10 General.

(a) The national research and technical assistance program established pursuant to subsection 310(a) of the Act is a program utilizing contracts and other arrangements to support regional and national research, study, and training activities which assist State efforts to develop and/or administer coastal zone management programs.

(1) This program will be conducted so as to complement and support work being done by States using grants under section 305 or 306 of the Act.

(2) Research, study and training efforts will be expected to address the needs of a group of States, a region, or the entire nation or the national coastal zone management program.

(b) The national research and technical assistance program is differentiated from the interstate grant program, pursuant to section 309 of the Act, by the former's emphasis on technical research, study and training. The interstate program, by contract, focuses upon regional cooperation and coordination with particular attention directed toward the development of compatible coastal zone policies.

§ 933.11 Eligible entities and arrangements.

(a) The Associate Administrator will enter into contracts or make other arrangements with any qualified person for the performance of work pursuant to subsection 310(a) of the Act.

(1) For purposes of this subsection, the term "other arrangements" includes both cost-reimbursable and non-reimbursable arrangements with other Federal agencies. Such arrangements shall include the use of the provisions of the Intergovernmental Personnel Act of 1970 (Pub. L. 91-648; Pub. L. 93-638) both for purposes of training and for providing technical assistance. Other arrangements may also include grants to State agencies or other units of government, or to educational or non-profit institutions.

(b) *Comment.* Statutory citation, subsection 310(a):

> Each department, agency, and instrumentality of the executive branch of the Federal Government may assist the Secretary, on a reimbursable basis or otherwise in carrying out the purposes of this section, including, but not limited to, the furnishing of information to the extent permitted by law, the transfer of personnel with their consent and without prejudice to their position and rating, and the performance of any research, study, and training which does not interfere with the performance of the primary duties of such department, agency or instrumentality.

§ 933.12 Use of funds.

(a) Research and studies under subsection 310(a) shall include studies, pilot or demonstration projects, or other analyses complementing or enhancing development and/or administration of State coastal management programs, but with broader application than research and studies funded pursuant to subsection 310(b). The term "broader application" is intended to imply both a broader geographic coverage and a broader range of problems.

(1) Research and studies funded under subsection 310(a) can be expected to:

(i) Supplement and enhance work geared toward management program development and administration;

(ii) Aid in the resolution of coastal zone management issues;

(iii) Have application to a group of States, a region, or the entire nation;

(iv) Assist in resolving issues related to the administration of the national coastal zone management program; and

(v) Where appropriate, be transferable or usable beyond the study area.

(2) In contrast to State grants pursuant to subsection 310(b), these efforts will not necessarily focus on technical and site-specific studies.

(b) Training under subsection 310(a) shall include study, course-work, or other educational activities geared toward developing and/or improving the capabilities of individuals working in or preparing to work in the field of coastal zone management. Such training need not be limited solely to the short-term, professional skill development anticipated in subsection 310(b).

(1) Training activities funded under subsection 310(a) can be expected to:

(i) Improve the capabilities of personnel currently involved in coastal zone management work,

(ii) Provide for the development of additional trained coastal zone management personnel,

(iii) Contribute to improved understanding of the field of coastal zone management, or

(iv) Meet the needs of, or be transferable to, a group of States, a region, or the entire nation.

(2) Training may include, but need not be limited to, the following:

(i) Internships or other training programs designed to provide actual experience working in the field of coastal zone management;

(ii) Course or curriculum development and testing at the high school, college, and graduate school levels;

(iii) Testing of new approaches to education and training in coastal zone management; and

(iv) Exploration of the relationship of coastal zone management to other related fields.

Subpart C—Operation of National Research and Technical Assistance Program

§ 933.20 Priorities and annual spending plans.

(a) Periodically, the Associate Administrator will develop a priorities plan for the national research and technical assistance program.

(1) This plan will indicate those coastal zone management issues, subjects, and areas which the Associate Administrator believes should be the subject of research, study, and training over a specific period of time (usually three to five years). Relative priorities will be assigned to major subject areas contained in the plan.

(2) In order to be responsive to State, regional, and national coastal zone management issues and needs, and to avoid duplication of research being conducted by others, the priorities plan will be circulated for comment in draft form to coastal States, other Federal agencies and other interested parties engaged in related research and/or training.

(3) After considering these comments, the Associate Administrator will finalize the priorities plan and make it generally available.

(4) The priorities plan will be revised periodically by the Associate Administrator and updated as deemed appropriate, following circulation of such changes for review and comment.

(b) *Comment.* Statutory citation, subsection 310(c)(1):

> The Secretary shall provide for the coordination of research, studies, and training activities under this section with any other such activities that are conducted by, or subject to the authority of, the Secretary.

(c) Based upon the priorities plan, the Associate Administrator will develop an annual spending plan for subsection 310(a) which will indicate planned research and technical assistance activities for that fiscal year in more detail. Where possible, the spending plan will also indicate the means by which the Associate Administrator intends to accomplish such studies (i.e., by request for proposals, transfer of funds to other Federal agencies, grants, etc.) and the timing of such actions.

(1) A summary of the spending plan and the updated priorities plan will be made available to all interested parties upon request.

§ 933.21 Funding arrangements.

(a) To accomplish the national research and technical assistance program, the Associate Administrator may utilize any appropriate procedures which may include:

(1) Competitive procurement,

(2) Sole source procurement,

(3) Grants to State agencies or other units of government, or to educational or non-profit institutions,

(4) Cooperative agreements,

(5) Cost-reimbursement of other Federal agencies, and

(6) Personnel transfers on a reimbursable or non-reimbursable basis.

(b) Because of the variety of funding arrangements available to the Associate Administrator pursuant to subsection 310(a), the specific application procedures will vary depending on the nature of appropriate arrangements, and will be in accordance with prescribed procedures applicable to the Federal government or pursuant to Department of Commerce or NOAA administrative procedures.

Subpart D—State Grants for Research and Technical Assistance

§ 933.30 General.

(a) The State research and technical assistance program, pursuant to subsection 310(b) of the Act, is a program of grants to States to support research, study and training activities which improve State capability to develop and/or administer coastal zone management programs.

(1) Research, study and training grant applications should develop from needs identified or problems experienced during program development and/or administration.

(2) Applications should be justified in terms of the usefulness of the anticipated results to basic program efforts.

(b) Because of the highly applied nature of research conducted pursuant to subsection 310(b) of the Act, it may be difficult to judge whether an activity is most appropriately funded pursuant to subsection 310(b) or pursuant to sections 305 and 306 of the Act.

(1) Generally speaking, those activities which are essential to meeting the criteria for program approval or which are integral to operating an approved program should be funded pursuant to sections 305 and 306 of the Act.

(2) Those activities which enhance or improve a State's ability to meet the criteria for approval or to operate an approved program should be funded pursuant to subsection 310(b).

(3) It is anticipated that research and studies funded pursuant to section 310(b) will be more technical in nature or more geographically specific than those activities typically funded pursuant to sections 305 and 306 of the Act.

§ 933.31 Eligible entities.

To be eligible for grants pursuant to subsection 310(b), a State must either be making adequate progress toward the development of a coastal zone management program pursuant to section 305 of the Act or be operating an approved management program pursuant to section 306 of the Act.

§ 933.32 Use of funds.

(a) For purposes of subsection 310(b), research and studies shall include studies, pilot or demonstration projects, or other analyses of short term duration which can be expected to show results within one year's time. Such research or studies shall be derived from State coastal zone management program development and/or administration needs and shall utilize existing materials to the extent possible.

(1) Such research and studies will tend to focus more on technical and site-specific issues rather than on institutional and managerial issues.

(2) Research and studies related to the coastal energy impact program, established pursuant to section 308 of the Act, may be funded pursuant to subsection 310(b) of the Act if such research and studies are clearly related to a State's ongoing management program efforts and if such research and studies are not otherwise fundable

pursuant to sections 308, 305 or 306 of the Act.

(3) Research and studies related to or conducted within an estuarine sanctuary established pursuant to section 315(1) of the Act may be funded under subsection 310(b) if such research and studies can be shown to be related to program administration, and otherwise meet the criteria set forth in these regulations.

(b) For purposes of subsection 310(b), training shall refer to the education or other development of such personnel as may be needed to efficiently and effectively develop and/or administer State coastal zone management programs or to administer coastal energy impact funds.

(1) In general, such training should be of short term duration and should be directed toward the development of specific job-related skills.

(2) Such training may be for, but not limited to, the following types of expertise at both the State and local levels: permit reviewers and inspectors, law enforcement officers, natural resource managers, economists, fiscal officers, attorneys, planners, and persons with specialized training in the natural sciences.

(c) Grants issued pursuant to subsection 310(b) of the Act may not be used for the following purposes:

(1) Basic and/or long term research or education efforts;

(2) State management program administration activities;

(3) Construction;

(4) Land acquisition; or

(5) Permanent equipment acquisitions, unless such acquisitions can also be used for program development and/or administration purposes.

§ 933.33 Funding priorities.

(a) The Associate Administrator will not establish priorities between nor allocate funds specifically to research and study activities on the one hand or training activities on the other.

(b) Highest funding priority will be given to those research, study and/or training activities which directly support program development and/or administration.

(c) Lower funding priority will be given to the following:

(1) Activities which have a continuing funding dimension and a long time frame for completion; and

(2) Institutional and/or management studies more appropriately funded pursuant to sections 305 and 306 of the Act.

Subpart E—Application for State Research and Technical Assistance Grants

§ 933.40 General.

(a) The purpose of this section is to define the procedures by which grantees apply for and administer grants under the Act and to provide guidelines regarding the content of applications for State research and technical assistance grants pursuant to subsection 310(b) of the Act. These procedures shall be use and interpreted in conjunction with the Grants management Manual for Grants under the Coastal Zone Management Act, hereinafter referred to as the "Manual." The Manual incorporates a wide range of Federal requirements, including those established by the Office of Management and Budget, the General Services Administration, the Department of the Treasury, the General Accounting Office, and the Department of Commerce.

(b) Applications for grants under subsection 310(b) of the Act will be accepted by the Associate Administrator at any time during the fiscal year provided that they contain the information required pursuant to § 933.42.

(c) States are encouraged to submit applications for grants under subsection 310(b) at the same time that they submit applications for grants under section 305 or 306 in order to enable the Associate Administrator to review more comprehensively State management program efforts and to expedite processing at both the State and Federal levels.

(d) States may submit more than one subsection 310(b) application per year if research or technical assistance needs arise that were not anticipated at the time of first application for subsection 310(b) funds.

(e) An application need not contain both research and training elements.

(f) Grants shall not exceed eighty percent of the total cost of the proposed research and/or training. Federal funds received from other sources cannot be used to match subsection 310(b) grants. Match provided by the applicant may consist of cash or in-kind services as provided in the Manual.

(g) Costs claimed as charges to the grant project must be beneficial and necessary to the objectives of the grant project. As used herein the terms "costs" and "grant project" pertain to both the Federal grant and the matching share. The allowability of costs will be determined in accordance with the provisions of FMC 74-4: Cost Principles Applicable to Grants and Contracts with State and Local Governments.

(h) Grants shall be made for a maximum of one year's duration.

§ 933.41 Applicant responsibility.

(a) The application shall designate the entity to receive and administer grants pursuant to subsection 310(b). The applicant for such grants must be that entity designated by the Governor pursuant to 15 CFR 920.52 where a State is developing a coastal management program or that entity designated by the Governor pursuant to section 306(c)(5) of the Act where a coastal State is administering an approved management program. This entity may, in turn, pass through funds to, or subcontract with, other entities.

(b) The grantee will be administratively and fiscally responsible for all aspects of the grant, including any subcontracts made by the grantee.

§ 933.42 Application procedure.

(a) All applications are subject to the provisions of E.O. 12372.

(b) The Form SF-424, Application for Federal Assistance (Non-Construction Programs), constitutes the formal application and must be submitted sixty days prior to the desired grant beginning date. The application must be accompanied by evidence of compliance with requirement of E.O. 12372, including the resolution of any problems raised about the proposed project. The Associate Administrator will not accept applications that are substantially deficient in adherence to E.O. 12372 requirements.

(c) In Part IV, Program Narrative, of the Form SF—424, the applicant shall respond to the following requirements:

(1) A description of the work program to be undertaken during the grant period. This work program shall include:

(i) A precise description of each major research or study task to be undertaken, including an explanation of the need for this task, how it will be accomplished, what existing material it builds on, what results are expected, and how these results will be used in the management program.

(ii) A precise description of each major training task to be undertaken, including an explanation of the need for this training, how it will be accomplished, what existing efforts it builds on, who will benefit from it, and how these benefits will relate to the management program.

(iii) For each task, identify any "Other Entities," as defined in the "Manual," that will be allocated responsibility for carrying out all or portions of the task, and indicate the estimated cost of any subcontract for each allocation. Identify, if any, that portion of the task that will be carried out under contract with consultants and indicate the estimated cost of such contract(s). Where all or part of the work is to be subcontracted, the extent and nature of grantee supervision should be indicated.

(iv) For each task indicate the estimated total cost. Also indicate the estimated total months of effort, if any, allocated to the task from the applicant's staff.

(2) The sum of all tasks in paragraph (c)(1) of this section should equal the total estimated grant project cost.

(3) Using two categories, Professional and Clerical, indicate the total number of personnel in each category on the applicant's staff that will be assigned to the grant project. Also indicate the number assigned full-time and the number assigned less than full-time in the two categories. Additionally, indicate the number of new positions created in the two categories

as a result of the grant project. Indicate total personnel costs.

(Executive Order 12372, July 14, 1982 (47 FR 30959), as amended April 8, 1983 (48 FR 15587); sec. 401, Intergovernmental Cooperation Act of 1968, as amended (31 U.S.C. 6506); sec 204, Demonstration Cities and Metropolitan Development Act of 1966 as amended (42 U.S.C. 3334)).

[42 FR 38738, July 29, 1977, as amended at 48 FR 29137, June 24, 1983]

§ 933.43 Approval of applications.

(a) An application for a state research, study and/or training grant which complies with the policies and requirements of the Act and the guidance contained in this subpart shall be approved by the Associate Administrator, assuming available funding.

(b) Should an application be found deficient, the Associate Administrator will notify the applicant in writing as to the manner in which the application fails to conform to the requirements of the Act or this subpart. Conferences may be held on these matters. Corrections to the application will provide the basis for resubmittal of the application for further consideration and review.

(c) The Associate Administrator may, upon finding extenuating circumstances relating to an application for State research, study and/or training grant, waive appropriate administrative requirements contained herein.

§ 933.44 Amendments.

(a) Amendments to an approved application must be submitted to the Associate Administrator prior to initiation of the contemplated change. Requests for substantial changes should be discussed with the Associate Administrator well in advance. While all amendments must be approved in writing by the NOAA Grants Officer, approval may be presumed for minor amendments if the grantee has not been notified of objections within thirty (30) working days of the date of postmark of the request.

§ 933.45 Copies of products.

(a) In order to insure the ability of the Associate Administrator to make the results of research conducted pursuant to this subsection available to any interested person, grantees shall supply the Associate Administrator with five (5) copies of any products, reports, studies, etc. financed in whole or in part by subsection 310(b) monies. Such products shall be received by the Associate Administrator no later than three months after the expiration date of the grant.

(b) *Comment.* Statutory citation, subsection 310(c)(2):

> The Secretary shall make the results of research conducted pursuant to this section available to any interested person.

(1) At least one of the copies received by the Associate Administrator shall be transmitted to the National Technical Information Service for purposes of assuring general availability to interested parties.

PART 935—THE CHANNEL ISLANDS NATIONAL MARINE SANCTUARY REGULATIONS

Sec.

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APPENDIX 1A—CHANNEL ISLANDS NATIONAL MARINE SANCTUARY

AUTHORITY: 16 U.S.C. 1431-1434.

SOURCE: 45 FR 65203, Oct. 2, 1980, unless otherwise noted.

§ 935.1 Authority.

The Sanctuary has been designated pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g) and 303 of the Act.

§ 935.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the extraordinary ecosystem including marine birds and mammals and other natural resources of the waters surrounding the northern Channel Islands and Santa Barbara Island and ensure the continued availability of the area as a research and recreational resource. This area supports a particularly rich and diverse marine biota, partially because it is located in a transition zone between northern and southern waters and partially because it is one of very few areas off the Southern California coast that has been relatively unaltered by human use.

§ 935.3 Boundaries.

The Sanctuary consists of an area of the waters off the coast of California of approximately 1252.5 square nautical miles adjacent to the following islands and offshore rocks: San Miguel Island, Santa Cruz Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, Richardson Rock, and Castle Rock extending seaward to a distance of 6 nautical miles (nm). The coordinates are shown in Appendix 1A.

§ 935.4 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(c) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, or any state or local unit of government.

(d) "Islands" means San Miguel Island, Santa Cruz Island, Santa Rosa Island, Anacapa Island, Santa Barbara Island, Richardson Rock, and Castle Rock.

(e) "Vessel" means watercraft of any description capable of being used as a means of transportation on the waters of the Sanctuary.

§ 935.5 Allowed activities.

All activities except those specifically prohibited by §§ 935.6 and 935.7 may be carried on in the Sanctuary subject to all prohibitions, restrictions and conditions imposed by any other authority. Recreational use of the area is encouraged.

§ 935.6 Hydrocarbon operations.

(a) Hydrocarbon exploration, development and production pursuant to any lease executed prior to the effective date of these regulations and the laying of any pipeline is allowed subject to paragraph (b) of this section and to all prohibitions, restrictions and conditions imposed by applicable regulations, permits, licenses or other authorizations and consistency reviews including those issued by the Department of the Interior, the Coast Guard, the Corps of Engineers, the Environmental Protection Agency and under the California Coastal Management Program and its implementing regulations.

(b) No person may engage in any hydrocarbon operation unless the following oil spill contingency equipment is available at the site of such operation:

(1) 1500 feet of open ocean containment boom and a boat capable of deploying the boom;

(2) One oil skimming device capable of open ocean use; and

(3) Fifteen bales of oil sorbent material.

(c) Hydrocarbon exploration, development and production activities pursuant to leases executed on or after the effective date of these regulations are prohibited.

§ 935.7 Prohibited activities.

(a) Except as may be necessary for the national defense, in accordance with Article 5, Section 2 of the Designation, or as may be necessary to respond to an emergency threatening life, property, or the environment, the following activities are prohibited within the Sanctuary unless permitted by the Assistant Administrator in accordance with § 935.9. All prohibitions shall be applied consistently with international law.

(1) *Discharge of substances.* No person shall deposit or discharge any materials or substances of any kind except:

(i) Fish or parts and chumming materials (bait);

(ii) Water (including cooling water) and other biodegradable effluents incidental to vessel use of the sanctuary generated by:

(A) Marine sanitation devices;

(B) Routine vessel maintenance, e.g. deck wash down;

(C) Engine exhaust; or

(D) Meals on board vessels;

(iii) Effluents incidental to hydrocarbon exploration and exploitation activities as allowed by § 935.6.

(2) *Alteration of, or construction on, the seabed.* Except in connection with the laying of any pipeline as allowed by § 935.6, within 2 nautical miles of any Island, no person shall:

(i) Construct any structure other than a navigation aid, or

(ii) Drill through the seabed, or

(iii) Dredge or otherwise alter the seabed in any way, other than

(A) To anchor vessels, or

(B) To bottom trawl from a commercial fishing vessel.

(3) *Commercial vessels operations.* Except to transport persons or supplies to or from an Island, no person shall operate within one nautical mile of an Island any vessel engaged in the trade of carrying cargo, including but not limited to tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be construed to limit access for fishing (including kelp harvesting), recreational, or research vessels.

(4) *Disturbing marine mammals and birds.* No person shall disturb seabirds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one nautical mile of any Island except:

(i) For enforcement purposes;

(ii) To engage in keep bed surveys; or

(iii) To transport persons or supplies to or from an Island.

(5) *Removing or damaging historical or cultural resources.* No person shall remove or damage any historical or cultural resource.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impact shall be determined in consultation between the Assistant Administrator and the Department of Defense.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions and other international agreements to which the United States is signatory.

§ 935.8 Penalities for commission of prohibited acts.

(a) Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 against any person subject to the jurisdiction of the United States for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding in rem against any vessel used in violation of any such regulation. Procedures are set out in Subpart D of Part 922 (15 CFR Part 922) of this chapter. Subpart D is applicable to any instance of a violation of these regulations.

§ 935.9 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct any activity in the Sanctuary prohibited under § 935.7 if such activity is either: (1) Research related to the resouces of the Sanctuary, (2) to further the educational value of the Sanctuary, or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to:

Assistant Administrator for Coastal Zone Management
Attn: Sanctuary Programs Office, Division of Operations and Enforcement
National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, N.W., Washington, DC 20235.

An application shall provide sufficient information to enable the Assistant Administrator to make the determination called for in paragraph (c) of this section and shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit the Assistant Administrator shall evaluate such matters as: (1) The general professional, and financial responsibility of the applicant; (2) the appropriateness of the methods envisioned to the purpose(s) of the activity; (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, or as a source of educational or scientific information; (4) the end value of the activity and (5) such other matters as may be deemed appropriate.

(d) In considering any application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of any person or entity, within or outside of the Federal government, and may hold a public hearing, as deemed appropriate.

(e) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed appropriate. The Assistant Administrator or a designated representative may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained shall be available to the public.

(f) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141)

[45 FR 65203, Oct. 2, 1980, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 935.10 Certification of other permits.

(a) All permits, licenses and other authorizations issued pursuant to any other authority are hereby certified and shall remain valid if they do not authorize any activity prohibited by § 935.6 or § 935.7. Any interested person may request that the Assistant Administrator offer an opinion on whether an activity is prohibited by these regulations.

§ 935.11 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 935.9 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator will notify the permit applicant, if other than the appellant, and will request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator will decide the appeal in accordance with the criteria set out in § 935.9(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing and the hearing officer's recommended decision, if any, as provided in paragraph (c) of this section, and such other considerations as deemed appropriate. The Administrator will notifiy all interested persons of the decision, and the reason(s) therefor, in writing, normally within 30 days of the receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a hearing officer designated for that purpose after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different) and, at the discretion of the hearing officer, other interested persons, may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator will notify interested persons of the decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action shall constitute final action for the agency for the purposes of the Administrative Procedures Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause, either upon his or her own motion or upon written request from the appellant or applicant stating the reason(s) therefor.

[45 FR 65203, Oct. 2, 1980, as amended at 49 FR 1041, Jan. 6, 1984]

APPENDIX IA—CHANNEL ISLANDS NATIONAL MARINE SANCTUARY

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	*Longitude west
Northern Channel Islands Section		
01	33°56'28.959"	119°16'23.800"
02	33°58'03.919"	119°14'56.964"
03	34°01'33.846"	119°14'07.740"
04	34°04'24.203"	119°15'21.308"
05	34°06'06.653"	119°17'27.0[illegible]2"
06	34°06'54.809"	119°19'46.046"
07	34°06'57.988"	119°23'24.905"
08	34°06'51.627"	119°24'04.198"
09	34°07'01.640"	119°25'40.819"
10	34°06'59.904"	119°26'50.959"
11	34°08'02.002"	119°28'47.501"
12	34°08'17.693"	119°29'27.698"
13	34°08'52.234"	119°30'39.562"
14	34°09'16.780"	119°35'22.667"
15	34°09'05.106"	119°36'41.694"
16	34°08'02.782"	119°39'33.421"
17	34°08'46.870"	119°41'48.621"
18	34°09'35.563"	119°45'57.284"
19	34°09'32.627"	119°46'37.335"
20	34°09'33.396"	119°47'32.285"
21	34°09'43.668"	119°48'09.018"
22	34°10'10.616"	119°50'07.659"
23	34°10'21.586"	119°51'05.146"
24	34°10'33.161"	119°53'17.044"
25	34°10'36.545"	119°55'57.373"
26	34°10'21.283"	119°57'26.403"
27	34°08'07.255"	120°01'07.233"
28	34°08'13.144"	120°02'27.930"
29	34°07'47.772"	120°05'05.449"
30	34°07'29.314"	120°06'36.262"
31	34°07'30.691"	120°09'35.236"
32	34°06'36.285"	120°12'39.335"
33	34°06'40.634"	120°13'33.940"
34	34°08'10.759"	120°15'07.017"
35	34°09'12.290"	120°17'07.046"
35A	34°09'50.706"	120°17'31.649"
36	34°10'56.346"	120°18'40.520"
36B	34°11'28.249"	120°19'29.213"
37	34°12'08.078"	120°21'00.835"
37C	34°12'25.468"	120°25'01.261"
38	34°12'18.754"	120°25'39.373"
38D	34°11'33.184"	120°27'33.921"
39	34°12'19.470"	120°30'22.620"
39E	34°12'17.540"	120°32'19.959"
40	34°10'54.592"	120°35'57.887"
40F	34°06'07.491"	120°38'27.883"
41	34°04'53.454"	120°38'16.602"
41G	34°03'30.539"	120°37'39.442"
42	34°01'09.860"	120°35'04.808"
42H	34°00'48.573"	120°34'25.106"
43	33°59'13.122"	120°33'53.385"
44	33°57'01.427"	120°31'54.590"
45	33°55'36.973"	120°27'37.188"
46	33°55'30.037"	120°25'14.587"
47	33°54'50.522"	120°22'29.536"
48	33°55'01.640"	120°19'26.722"
49	33°54'34.409"	120°18'27.344"
50	33°53'23.129"	120°17'39.927"
51	33°50'39.990"	120°15'13.874"
52	33°49'53.260"	120°13'41.904"
53	33°49'03.437"	120°12'06.750"
54	33°48'36.067"	120°11'10.821"
55	33°47'39.260"	120°07'59.707"

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	Longitude west
56	33°47'37.617"	120°06'04.002"
57	33°47'59.351"	120°04'06.370"
58	33°48'38.700"	120°02'33.188"
59	33°48'52.167"	120°01'50.244"
60	33°50'28.486"	119°57'50.820"
61	33°50'55.126"	119°55'19.934"
62	33°52'13.336"	119°52'53.439"
63	33°52'04.900"	119°52'10.719"
64	33°51'39.919"	119°47'21.152"
65	33°51'48.592"	119°46'13.213"
66	33°51'35.798"	119°44'34.589"
67	33°51'44.374"	119°41'12.738"
68	33°52'23.857"	119°39'14.708"
69	33°53'09.365"	119°37'30.784"
70	33°53'12.754"	119°35'35.793"
71	33°53'17.114"	119°34'54.567"
72	33°53'38.865"	119°32'51.578"
73	33°54'02.277"	119°31'06.274"
74	33°54'56.444"	119°28'54.052"
75	33°54'39.349"	119°27'37.512"
76	33°54'15.236"	119°25'23.779"
77	33°54'07.847"	119°24'22.849"
78	33°54'04.662"	119°22'58.006"
79	33°54'14.311"	119°21'44.573"
80	33°54'22.824"	119°21'09.003"
81	33°54'46.904"	119°19'54.677"
82	33°55'05.834"	119°19'16.027"
Santa Barbara Island Section		
83	33°28'56.904"	119°10'04.092"
84	33°26'32.364"	119°10'01.328"
85	33°24'19.904"	119°08'52.236"
86	33°23'26.019"	119°07'54.826"
87	33°22'04.836"	119°05'16.716"
88	33°21'49.387"	119°04'01.551"
89	33°21'44.594"	119°02'49.887"
90	33°21'49.556"	119°01'37.839"
91	33°22'07.538"	118°59'49.357"
92	33°22'27.774"	118°58'51.623"
93	33°22'47.957"	118°58'07.633"
94	33°23'20.805"	118°57'14.375"
95	33°24'18.458"	118°56'08.450"
96	33°26'24.130"	118°54'51.352"
97	33°29'02.820"	118°54'22.276"
98	33°31'27.917"	118°54'50.367"
99	33°32'17.935"	118°55'18.396"
100	33°35'10.090"	118°59'40.091"
101	33°35'24.575"	119°01'22.108"
102	33°35'06.497"	119°03'59.463"
103	33°34'48.322"	119°05'03.374"
104	33°32'37.151"	119°08'37.201"
105	33°30'41.731"	119°09'45.845"

[47 FR 5212, Feb. 4, 1982]

PART 936—THE POINT REYES/FARALLON ISLANDS MARINE SANCTUARY REGULATIONS

Sec.
936.1 Authority.
936.2 Purpose.
936.3 Boundaries.
936.4 Definitions.
936.5 Allowed activities.
936.6 Prohibited activities.
936.7 Penalties for commission of prohibited acts.
936.8 Permit procedures and criteria.
936.9 Certification of other permits.
936.10 Appeals of administrative action.
APPENDIX I—POINT REYES-FARALLON ISLANDS NATIONAL MARINE SANCTUARY

AUTHORITY: Secs. 302(d), (f), (g), and 303 of Title III, Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431-1434. Secs. 302(f), 302(g) and 303, Act.

SOURCE: 46 FR 7939, Jan. 26, 1981, unless otherwise noted.

§ 936.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g), and 303 of the Act.

§ 936.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the extraordinary ecosystem, including marine birds, mammals, and other natural resources, of the waters surrounding the Farallon Islands and Point Reyes, and to ensure the continued availability of the area as a research and recreational resource.

§ 936.3 Boundaries.

The Sanctuary consists of an area of the waters adjacent to the coast of California north and south of the Point Reyes Headlands, between Bodega Head and Rocky Point and the Farallon Islands (including Noonday Rock), and includes approximately 948 square nautical miles (nmi²). The coordinates are listed in Appendix I.

The shoreward boundary follows the mean high tide line and the seaward limit of Point Reyes National Seashore. Between Bodega Head and Point Reyes Headlands, the Sanctuary extends seaward 3 nmi beyond State waters. The Sanctuary also includes the waters within 12 nmi of the Farallon Islands, and between the Islands and the mainland from Point Reyes

Headlands to Rocky Point. The Sanctuary includes Bodega Bay, but not Bodega Harbor.

§ 936.4 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Areas of Special Biological Significance" (ASBS) means those areas established by the State of California prior to the designation of the sanctuary except that for purposes of these regulations, the area established around the Farallon Islands shall not be included.

(c) "Assistant Administrator" means the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(d) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government or any State or local unit of government.

(e) "Vessel" means watercraft of any description capable of being used as a means of transportation on the waters of the Sanctuary.

§ 936.5 Allowed activities.

All activities except those specifically prohibited by § 936.6 may be carried on in the Sanctuary subject to all prohibitions, restrictions, and conditions imposed by any other authority. Recreational use of the area is encouraged.

§ 936.6 Prohibited activities.

(a) Except as may be necessary for national defense, in accordance with Article 5, Section 2 of the Designation, or as may be necessary to respond to an emergency threatening life, property or the environment, the following activities are prohibited within the Sanctuary unless permitted by the Assistant Administrator in accordance with § 936.8 or § 936.9. All prohibitions shall be applied consistently with international law.

(1) *Hydrocarbon operations.* Hydrocarbon exploration, development, and production are prohibited except that pipelines related to operations outside the Sanctuary may be placed at a distance greater than 2 nmi from the Farallon Islands, Bolinas Lagoon, and Areas of Special Biological Significance where certified to have no significant effect on sanctuary resources in accordance with § 936.9.

(2) *Discharge of substances.* No person shall deposit or discharge any materials or substances of any kind except:

(i) Fish or parts and chumming materials (bait).

(ii) Water (including cooling water) and other biodegradable effluents incidental to vessel use of the sanctuary generated by:

(A) Marine sanitation devices;

(B) Routine vessel maintenance, e.g., deck wash down;

(C) Engine exhaust; or

(D) Meals on board vessels.

(iii) Dredge material disposed of at the interim dumpsite now established approximately 10 nmi south of the southeast Farallon Island and municipal sewage provided such discharges are certified in accordance with § 936.9.

(3) *Alteration of or construction on the seabed.* Except in connection with the laying of pipelines or construction of an outfall if certified in accordance with § 936.9, no person shall:

(i) Construct any structure other than a navigation aid,

(ii) Drill through the seabed, and

(iii) Dredge or otherwise alter the seabed in any way other than by anchoring vessels or botton trawling from a commercial fishing vessel, except for routine maintenance and navigation, ecological maintenance, mariculture, and the construction of docks and piers in Tomales Bay.

(4) *Operations of vessels.* Except to transport persons or supplies to or from islands or mainland areas adjacent to sanctuary waters, within an area extending 2 nautical miles from the Farallon Islands, Bolinas Lagoon, or any Area of Special Biological Significance, no person shall operate any vessel engaged in the trade of carrying cargo, including but not limited to tankers and other bulk carriers and barges, or any vessel engaged in the trade of servicing offshore installations. In no event shall this section be

construed to limit access for fishing, recreational or research vessels.

(5) *Disturbing marine mammals and birds.* No person shall disturb seabirds or marine mammals by flying motorized aircraft at less than 1000 feet over the waters within one nautical mile of the Farallon Islands, Bolinas Lagoon, or any Area of Special Biological Significance except to transport persons or supplies to or from the Islands or for enforcement purposes.

(6) *Removing or damaging historical or cultural resources.* No person shall remove or damage any historical or cultural resource.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impacts shall be determined in consultation between the Assistant Administrator and the Department of Defense.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions, and other international agreements to which the United States is signatory.

§ 936.7 Penalties for commission of prohibited acts.

(a) Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 against any person subject to the jurisdiction of the United States for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding in rem against any vessel used in violation of any such regulation. Procedures are outlined in Subpart D of Part 922 (15 CFR Part 922) of this chapter. Subpart D is applicable to any instance of a violation of these regulations.

§ 936.8 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct any activity in the Sanctuary, prohibited under § 936.6, if such an activity is (1) research related to the resources of the Sanctuary, (2) to further the educational value of the Sanctuary, or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to the Assistant Administrator for Coastal Zone Management, Attn: Office of Coastal Zone Management, Sanctuary Programs Office, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, DC 20235. An application shall provide sufficient information to enable the Assistant Administrator to make the determination called for in paragraph (c) of this section and shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit, the Assistant Administrator shall evaluate (1) the general professional and financial responsibility of the applicant, (2) the appropriateness of the methods envisioned to the purpose(s) of the activity, (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary, (4) the end value of the activity, and (5) other matters as deemed appropriate.

(d) In considering any application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of any person or entity, within or outside the Federal government, and may hold a public hearing, as deemed appropriate.

(e) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed appropriate. The Assistant Administrator or a designated representative may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained will be made available to the public.

(f) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141)

[46 FR 7939, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 936.9 Certification of other permits.

(a) All permits, licenses, and other authorizations issued pursuant to any other authority are hereby certified and shall remain valid if they do not authorize any activity prohibited by § 936.6. Any interested person may request that the Assistant Administrator offer an opinion on whether an activity is prohibited by these regulations.

(b) A permit, license, or other authorization allowing the discharge of municipal sewage, the laying of any pipeline outside 2 nmi from the Farallon Islands, Bolinas Lagoon and Areas of Special Biological Significance, or the disposal of dredge material at the interim dumpsite now established approximately 10 nmi south of the Southeast Farallon Island prior to the selection of a permanent dumpsite shall be valid if certified by the Assistant Administrator as consistent with the purpose of the Sanctuary and having no significant effect on sanctuary resources. Such certification may impose terms and conditions as deemed appropriate to ensure consistency.

(c) In considering whether to make the certifications called for in this section, the Assistant Administrator may seek and consider the views of any other person or entity, within or outside the Federal government, and may hold a public hearing as deemed appropriate.

(d) Any certification called for in this section shall be presumed unless the Assistant Administrator acts to deny or condition certification within 60 days from the date that the Assistant Administrator receives notice of the proposed permit and the necessary supporting data.

(e) The Assistant Administrator may amend, suspend, or revoke any certification made under this section whenever continued operation would violate any terms or conditions of the certification. Any such action shall be forwarded in writing to both the holder of the certified permit and the issuing agency and shall set forth reason(s) for the action taken.

(f) Either the holder or the issuing agency may appeal any action conditioning, denying, amending, suspending, or revoking any certification in accordance with the procedure provided for in § 936.10.

§ 936.10 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 936.8 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator will notify the permit applicant, if other than the appellant, and may request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator will decide the appeal in accordance with the criteria defined in § 936.8(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing, and the hearing officer's recommended decision, if any, as provided in paragraph (c) of this section and such other considerations as deemed appropriate. The Administrator will notify all interested persons of the decision, and the reason(s) for the decision, in writing, within 30 days of receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines one is appropriate, the Administrator may grant an informal hearing before a designated hearing officer after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing must normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different), and other interested persons (at the discretion of the hearing officer) may appear personally or by counsel at the hearing, and submit material and present arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify interested persons of the decision, and the reason(s) for the decision, in writing, within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action will constitute final action for the agency for the purposes of the Administrative Procedures Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause upon written request from the appellant or applicant stating the reason(s) for the extension.

[46 FR 7939, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984]

APPENDIX I—POINT REYES-FARALLON ISLANDS NATIONAL MARINE SANCTUARY

[Coordinates are furnished to 0.001 of a second]

Point No.	Latitude north	Longitude west
1	38°15'50.349"	123°10'48.933"
2	38°12'36.338"	123°07'04.846"
3	38°09'57.033"	123°05'27.435"
4	38°08'26.872"	123°04'52.524"
5	38°07'42.125"	123°05'10.714"
6	38°06'08.017"	123°05'48.920"
7	38°05'26.765"	123°06'09.922"
8	38°04'44.587"	123°06'29.251"
9	38°03'54.439"	123°06'57.591"
10	38°03'07.527"	123°07'37.755"
11	37°59'32.425"	123°08'24.905"
12	37°59'22.344"	123°14'06.127"
13	37°57'31.931"	123°19'19.187"
14	37°54'16.943"	123°23'18.456"
15	37°50'05.522"	123°25'28.791"
16	37°45'33.799"	123°25'32.666"
17	37°41'20.351"	123°23'29.811"
18	37°38'01.053"	123°19'37.445"
19	37°36'04.665"	123°14'30.463"
20	37°35'30.191"	123°13'31.060"
21	37°33'47.197"	123°11'50.904"
22	37°31'12.270"	123°07'39.618"
23	37°30'29.706"	123°05'42.221"
24	37°29'39.287"	123°00'23.711"
25	37°30'34.337"	122°54'18.139"
26	37°31'47.784"	122°51'31.592"
27	37°34'17.533"	122°48'10.415"
28	37°36'58.627"	122°46'05.779"
29	37°39'59.303"	122°44'59.838"
30	37°52'56.355"	122°37'35.195"

[47 FR 5212, Feb. 4, 1982]

PART 937—THE LOOE KEY NATIONAL MARINE SANCTUARY REGULATIONS

Sec.
937.1 Authority.
937.2 Purpose.
937.3 Boundaries.
937.4 Definitions.
937.5 Allowed activities.
937.6 Activities prohibited without a permit.
937.7 Penalties for commission of prohibited acts.
937.8 Permit procedures and criteria.
937.9 Other permits.
937.10 Appeals from administrative action.

AUTHORITY: Secs. 302(f), 302(g), 303, Pub. L. 92-532. 86 Stat. 1061, 1062 (16 U.S.C. 1431-1434).

SOURCE: 46 FR 7949, Jan. 26, 1981, unless otherwise noted.

§ 937.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g), and 303 of the Act.

§ 937.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the coral reef ecosystem and other natural resources of the waters at Looe Key and to ensure the continued availability of the area for public educational purposes and as a commercial, ecological, research and recreational resource. This area supports a particularly rich and diverse marine biota. The area is easily accessible to the lower Florida Keys and is widely used by boaters, charter boat operators, dive boats, recreational divers and fishermen. Consequently, both present and potential levels of use may result in harm to Looe Key in the absence of long-term planning, research, monitoring and adquate protection.

§ 937.3 Boundaries.

The Sanctuary consists of an area of 5.32 square nautical miles of high sea waters off the coast of the lower Florida Keys, 6.7 nautical miles (12.5 km) southwest of Big Pine Key. The area includes the waters overlaying a section of the submerged Florida reef tract at Looe Key. The precise boundaries are:

LATITUDE AND LONGITUDE ARE FURNISHED TO .001 OF A SECOND

Pt. No.	Latitude	Longitude
2-1	24°31′37″	81°26′00″
2-2	24°33′34″	81°26′00″
2-3	24°34′09″	81°23′00″
2-4	24°32′12″	81°23′00″

§ 937.4 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Assistant Administrator" means the Assistant Admistrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(c) "Person" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, or any State or local unit of the government.

(d) "Tropical fish" means fish and invertebrates of minimal sport and food value, usually brightly colored, often used for aquaria purposes and which live in a close interrelationship with the coral.

(e) "The Fore Reef" means the area of the well defined "spur and groove" coral reef as delineated by Loran readings 1, 2, 3, 4 as follows:

1. NW 7980-W-13973.7, 7980-Y-43532.7
2. SW 7980-W-13975.4, 7980-Y-43543.4
3. NE 7980-W-13975.0, 7980-Y-43530.1
4. SE 7980-W-13975.4, 7980-Y-43527.7

§ 937.5 Allowed activities.

All activities except those specifically prohibited by § 937.6 may be carried on in the Sanctuary subject to all prohibitions, restrictions and conditions imposed by any other authority.

§ 937.6 Activities prohibited without a permit.

(a) Unless permitted by the Assistant Administrator in accordance with § 937.8, or as may be necessary for the national defense, in accordance with Article 5, Section 2 of the Designation, or to respond to an emergency threatening life, property or the environment, the following activities are prohibited within the Sanctuary. All prohibitions must be applied consistently with international law.

(1) *Removing or damaging distinctive natural features.* (i) No person shall break, cut or similarly damage or take any coral or marine invertebrate except as an incidental result of anchoring outside the Fore Reef where sand anchoring is encouraged but not required. Divers are prohibited from handling coral or standing on coral formations.

(ii) No person shall take, except incidentally to allowed fishing activities, any tropical fish or marine invertebrate.

(iii) There shall be a rebuttable presumption that any items listed in this paragraph found in the possession of a person within the Sanctuary have been collected or removed from within the Sanctuary.

(2) *Operation of watercraft.* All watercraft shall be operated in accordance with Federal rules and regulations that would apply if there were no sanctuary. The following constraints also shall be imposed.

(i) No person shall place any anchor on coral within the Fore Reef of the Sanctuary nor allow any chain or rope to enter the Fore Reef in a way that injures any coral. When anchoring dive boats, the first diver down shall inspect the anchor to ensure that it is placed off the corals and will not shift in such a way as to damage corals. No further diving is permitted until the anchor is placed in accordance with these requirements.

(ii) Watercraft must use mooring buoys, stations or anchoring areas when such facilities and areas have been designated and are available.

(iii) Watercraft shall not be operated in such a manner as to strike or otherwise cause damage to the natural features of the Sanctuary.

(iv) All watercraft from which diving operations are being conducted shall fly in a conspicuous manner, the red and white "divers down" flag.

(3) *Using harmful fishing methods.* (i) No person shall use or place wire fish traps within the Sanctuary.

(ii) No person shall place lobster traps within the Fore Reef area of the Sanctuary.

(iii) No person shall use pole spears, Hawaiian slings, rubber-powered arbalets, pneumatic and spring loaded guns or similar devices known as spearguns within the Sanctuary.

(iv) No person shall use poisons, electric charges, explosives or similar methods within the Sanctuary.

(4) *Removing or damaging distinctive historical or cultural resources.* No person shall remove, damage or tamper with any historical or cultural resources, including cargo pertaining to submerged wrecks.

(5) *Discharges.* No person shall deposit or discharge any materials or substances of any kind except:

(i) Fish or parts and chumming materials.

(ii) Cooling water from vessels.

(iii) Effluents from marine sanitation devices.

(6) *Markers.* (i) No person shall mark, deface or damage in any way or displace, remove or tamper with any signs, notices, or placards, whether temporary or permanent, or with any monuments, stakes, posts or other boundary markers installed by the managers or markers placed for the purpose of lobster pot fishing.

(ii) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impacts shall be determined in consultation between the Assistant Administrator and the Department of Defense.

(iii) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with principles of international law, including treaties, conventions and other international agreements to which the United States is signatory.

§ 937.7 Penalties for commission of prohibited acts.

Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 against any person subject to the jurisdiction of the United States for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding *in rem* against any vessel used in violation of any such regulation. Procedures are outlined in Subpart D of Part 922 (15 CFR Part 922) of this chapter. Subpart D is applicable to any instance of a violation of these regulations.

§ 937.8 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct the specific activ-

best copy available

ity in the Sanctuary including any activity specifically prohibited under § 937.6, if such activity is (1) research related to the resources of the Sanctuary, (2) to further the educational value of the Sanctuary, or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to the Assistant Administrator for Coastal Zone Management, ATTN: Sanctuary Programs Office, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, DC 20235. An application shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit the Assistant Administrator shall evaluate such matters as (1) the general profession and financial responsibility of the applicant; (2) the appropriateness of the methods envisioned to the purpose(s) of the activity; (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreational, educational or scientific information; (4) the end value of the activity; and (5) such other matters as deemed appropriate.

(d) In considering any application submitted pursuant to this section the Assistant Administrator shall seek the views of the Fishery Management Councils and may seek and consider the views of any person or entity, within or outside of the Federal government, and may hold a public hearing, as deemed appropriate.

(e) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed appropriate. The Assistant Administrator or a designated representative may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained shall be made available to the public.

(f) The permit granted under paragraph (e) of this section may not be transferred without written permission of the Assistant Administrator.

(g) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141)

[46 FR 7949, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 937.9 Other permits.

All permits, licenses and other authorizations issued pursuant to any other authority remain valid if they do not authorize any activity prohibited by § 937.6. Any interested person may request that the Assistant Administrator offer an opinion on whether an activity is prohibited by these regulations.

§ 937.10 Appeals from administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 937.8 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator shall notify the permit applicant, if other than the appellant, and may request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator shall decide the appeal in accordance with the criteria set in § 937.8(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing and the hearing officer's recommended decision, if any, as provided in paragraph (c) of this section and such other considerations as deemed appropriate. The Administrator shall notify all interested persons of the decision, and the reason(s) therefor in writing, normally within 30 days of the receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines one is appropriate, the Administrator may grant an informal hearing before a hearing officer designated for that purpose after first giving notice of the time, place, and subject matter of the hearing in the FEDERAL REGISTER. Such hearing shall normally be held no later than 30 days following publication of the notice in the FEDERAL REGISTER unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different) and, at the discretion of the hearing officer, other interested persons, may appear personally or by counsel at the hearing and submit material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify interested persons of the decision, and reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action shall constitute final action for the Agency for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause, either upon his or her own motion or upon written request from the appellant or applicant stating the reason(s) therefor.

[46 FR 7949, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984]

PART 938—THE GRAY'S REEF NATIONAL MARINE SANCTUARY REGULATIONS

Sec.
938.1 Authority.
938.2 Purpose.
938.3 Boundaries.
938.4 Definitions.
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938.6 Prohibited activities.
938.7 Penalties for commission of prohibited acts.
938.8 Permit procedures and critieria.
938.9 Certification of other permits.
938.10 Appeals of administrative action.

AUTHORITY: Secs. 302(a), (f), (g) and 303 of Title III, Marine Protection, Research and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431-1434.

SOURCE: 46 FR 7944, Jan. 26, 1981, unless otherwise noted.

§ 938.1 Authority.

The Sanctuary has been designated pursuant to the authority of section 302(a) of Title III of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 through 1434 (the Act). The following regulations are issued pursuant to the authorities of sections 302(f), 302(g), and 303 of the Act.

§ 938.2 Purpose.

The purpose of designating the Sanctuary is to protect and preserve the live bottom ecosystem and other natural resources of the waters of Gray's Reef and to ensure the continued availability of the area as an ecological, research, and recreational resource.

§ 938.3 Boundaries.

The sanctuary consists of 16.68 square nautical miles of high sea waters off the coast of Georgia. The sanctuary boundary includes all waters within a rectangle starting at coordinate 31° 21′ 45″ N, 80° 55′ 17″ W, commencing to coordinate 31° 25′ 15″ N, 80° 55′ 17″ W, thence to coordinate 31° 25′ 15″ N, 80° 49′ 42″ W, thence to coordinate 31° 21′ 45″ N, 80° 49′ 42″ W, thence back to the point of origin.

§ 938.4 Definitions.

(a) "Administrator" refers to the Administrator of the National Oceanic and Atmospheric Administration.

(b) "Assistant Administrator" refers to the Assistant Administrator for Coastal Zone Management, National Oceanic and Atmospheric Administration.

(c) "Person" is any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government or any State or local unit of government.

§ 938.5 Allowed activities.

All activities except those specifically prohibited by § 938.6 may be carried out within the Sanctuary subject to all prohibitions, restrictions, and conditions imposed by any other authority.

§ 938.6 Prohibited activities.

(a) Except as may be necessary for national defense in accordance with Article 5, Section 2 of the Designation or as may be necessary to respond to an emergency threatening life, property, or the environment, the following activities are prohibited within the Sanctuary unless permitted by the Assistant Administrator in accordance with § 938.8. All prohibitions will be applied consistently with international law.

(1) *Alteration of or construction on the seabed.* No person shall dredge, drill, or otherwise alter the seabed in any way nor construct any structure other than a navigation aid without a permit.

(2) *Discharge of substances.* No person shall deposit or discharge any materials or substances of any kind except:

(i) Fish or parts, bait, and chumming materials;

(ii) Effluent from marine sanitation devices; and

(iii) Vessel cooling waters.

(3) *Operation of watercraft.* All watercraft shall be operated in accordance with Federal rules and regulations that would apply if there were no Sanctuary.

(4) *Wire trap fishing.* No person shall use, place, or possess wire fish traps within the Sanctuary without a permit.

(5) *Bottom trawling and specimen dredging.* No person shall use a bottom trawl, specimen dredge, or similar vessel-towed bottom sampling device within the Sanctuary without a permit.

(6) *Marine specimen collecting.* (i) No person shall break, cut, or similarly damage, take, or remove any bottom formation, any marine invertebrate, or any marine plant without a permit.

(ii) No person shall take without a permit any tropical fish, which is a fish of minimal sport and food value, usually brightly colored, often used for aquaria purposes, and which lives in a direct relationship with the live bottom community.

(iii) There shall be a rebuttable presumption that any items listed in this paragraph found in the possession of a person within the Sanctuary have been collected or removed from the Sanctuary.

(iv) No person shall use poisons, electric charges, explosives, or similar methods to take any marine animal or plant.

(7) *Removing or damaging historic or cultural resources.* No person shall tamper with, damage, or remove any historic or cultural resources without a permit.

(b) All activities currently carried out by the Department of Defense within the Sanctuary are essential for the national defense and, therefore, not subject to these prohibitions. The exemption of additional activities having significant impacts shall be determined in consultation between the Assistant Administrator and the Department of Defense.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized priniciples of international law, including treaties, conventions, and other international agreements to which the United States is signatory.

§ 938.7 Penalties for commission of prohibited acts.

Section 303 of the Act authorizes the assessment of a civil penalty of not more than $50,000 against any person subject to the jurisdiction of the United States for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding in rem against any vessel used in violation of any such regulation.

§ 938.8 Permit procedures and criteria.

(a) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct the specific activity in the Sanctuary including any activity specifically prohibited under § 938.6, if such activity is (1) research related to the resources of the Sanctuary, (2) to further the educational value of the Sanctuary, or (3) for salvage or recovery operations.

(b) Permit applications shall be addressed to the Assistant Administrator for Coastal Zone Management, Attn: Office of Sanctuary Programs, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, DC 20235. An application shall provide sufficient information to enable the Assistant Administrator to make the determination called for in paragraph (c) of this section and shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(c) In considering whether to grant a permit, the Assistant Administrator shall evaluate (1) the general professional and financial responsibility of the applicant, (2) the appropriateness of the methods envisioned to the purpose(s) of the activity, (3) the extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary, (4) the end value of the activity, and (5) other matters as deemed appropriate.

(d) In considering any application submitted pursuant to this section, the Assistant Administrator may seek and consider the views of any person or entity, within or outside of the Federal Government, and may hold a public hearing, as deemed appropriate.

(e) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject to such condition(s) as deemed appropriate. The Assistant Administrator or a designated representative may observe any permitted activity and/or require the submission of one or more reports of the status or progress of such activity. Any information obtained will be made available to the public.

(f) The Administrator may suspend, revoke, modify, or deny a permit granted or sought pursuant to this section, in whole or in part, if it is determined that the applicant or permit holder has acted in violation of the terms of the permit or of these regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at Subpart D of 15 CFR Part 904.

(Information collection requirements contained in paragraph (b) have been approved by the Office of Management and Budget under control number 0648-0141)

[46 FR 7944, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984; 49 FR 13335, Apr. 4, 1984]

§ 938.9 Certification of other permits.

(a) All permits, licenses and other authorizations issued pursuant to any other authority are hereby certified and shall remain valid if they do not authorize any activity prohibited by § 938.6. Any interested person may request that the Assistant Administrator offer an opinion on whether an activity is prohibited by these regulations.

(b) The Assistant Administrator may amend, suspend, or revoke the certification made under this section whenever continued operation would violate any term or conditions of the certification. Any such action shall be forwarded in writing to both the holder of the certified permit and the issuing agency and shall set forth reason(s) for the action taken. Either the permit holder or the issuing agency may appeal the action as provided for in § 938.10.

§ 938.10 Appeals of administrative action.

(a) Except as provided in Subpart D of 15 CFR Part 904, any interested person (the Appellant) may appeal the granting, denial, conditioning, or suspension of any permit under § 938.8 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed, and the reasons therefore, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator will notify the permit applicant, if other than the appellant, and may request such additional information and in such form as will allow action upon the appeal. Upon receipt of sufficient information, the Administrator will decide the appeal in accordance with the criteria defined in § 938.8(c) as appropriate, based upon information relative to the application on file at OCZM and any additional information, the summary record kept of any hearing, the hearing office's recommended decision, if any, as provided in paragraph (c) of this section, and such other considerations as deemed appropriate. The Administrator will notify all interested persons of the decision and the reason(s) for the decision, in writing, within 30 days of receipt of sufficient information, unless additional time is needed for a hearing.

(c) If a hearing is requested or if the Administrator determines one is appropriate, the Administrator may grant an informal hearing before a designated hearing officer after first giving notice of the time, place, and subject matter of the hearing in the Federal Register. Such hearing must normally be held no later than 30 days following publication of the notice in the Federal Register unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant (if different) and other interested persons (at the discretion of the hearing officer) may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the last day of the hearing, the hearing officer shall recommend in writing a decision to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify interested persons of the decision and the reason(s) for the decision, in writing, within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's action will constitute final action for the Agency for the purposes of the Administrative Procedures Act.

(e) Any time limit prescribed in this section may be extended for a period not to exceed 30 days by the Administrator for good cause upon written request from the appellant or applicant stating the reason(s) for the extension.

[46 FR 7944, Jan. 26, 1981, as amended at 49 FR 1041, Jan. 6, 1984]

PART 941—FAGATELE BAY NATIONAL MARINE SANCTUARY REGULATIONS

Sec.

941.1 Authority.
941.2 Purpose.
941.3 Scope of regulations.
941.4 Boundaries.
941.5 Definitions.
941.6 Management and enforcement.
941.7 Allowed activities.
941.8 Activitives prohibited or controlled.
941.9 Other authorities.
941.10 Penalties for commission of prohibited acts.
941.11 Permit procedures and criteria.
941.12 Appeal of permit action.

Authority: Title III of Pub. L. 98-498, 16 U.S.C. 1431-1439. (Pub. L. 92-532 as amended by Pub. L. 96-332 and Pub. L. 98-498).

SOURCE: 51 FR 15880, Apr. 29, 1986, unless otherwise noted.

§ 941.1 Authority.

The Sanctuary has been designated by the Secretary of Commerce pursuant to the authority of section 303(a) of the Marine Protection, Research and Sanctuaries Act of 1972, (the Act), 16 U.S.C. 1433; (Pub. L. 98-498). The following regulations are issued pursuant to Title III of the Act.

§ 941.2 Purpose.

The purpose of designating the Fagatele Bay National Marine Sanctuary is to protect a unique deepwater terrace formation and a coral reef ecosystem representative of the warm water tropical Pacific Islands in its natural state and to regulate uses within the Sanctuary to ensure the health and integrity of the ecosystem and its associated flora and fauna.

§ 941.3 Scope of regulations.

The provisions of this part apply only to the area defined by regulation as the Fagatele Bay National Marine Sanctuary (the Sanctuary). Neither these provisions nor any permit issued under its authority shall be construed to relieve a person from any other requirements imposed by statute or regulation of the Territory of American Samoa or of the United States. In addition, no statute or regulation of the Territory of American Samoa shall be construed to relieve a person from the restrictions, conditions, and requirements contained in this part.

§ 941.4 Boundaries.

The Sanctuary is a 163-acre (.25 sq. mi.) coastal embayment formed by a collapsed volcanic crater on the island of Tutuila, American Samoa. The site is divided into two Subzones, *A* and *B*, and includes Fagatele Bay in its entirety up to mean high high water (MHHW). The seaward boundaries are defined by straight lines between the following points, as approved by the NOAA Charting Services Branch, and the American Samoa Department of Public Works:

Point	Pt. No.	Subzone	Latitude	Longitude
Fagatele Point	1-1	A	14°22′15″ S	170°46′5″ W
Matautuloa Benchmark	1-2	A	14°22′18″ S	170°45′35″ W
Fagatele Point	2-1	B	14°22′15″ S	170°46′5″ W
Steps Point	2-2	B	14°22′44″ S	170°45′27″ W

§ 941.5 Definitions.

(a) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration (NOAA).

(b) "Assistant Administrator" menas the Assistant Administrator for Ocean Services and Coastal Zone Management, National Ocean Service, National Oceanic and Atmospheric Administration, or his or her successor, or designee.

(c) "Benthic Community" means the assemblage of organisms, substrate, and structural formations found at or near the bottom that is periodically or permanently covered by water.

(d) "Commercial Fishing" means any activity that results in the sale or trade for intended profit of fish, shellfish, algae, or corals.

(e) "Cultural Resources" means any historical or cultural feature, including archaeological sites, historic structures, shipwrecks, and artifacts.

(f) "Designation" means the action taken by the Secretary of Commerce, to prescribe, through a Designation Document and implementing rules and regulations, the terms for establishing the Sanctuary.

(g) "Director" means Director of the Development Planning Office, Territory of American Samoa or the head of any successor agency.

(h) "The Management Plan" means the document that outlines the day-to-day operations of the Fagatele Bay National Marine Sanctuary and includes but is not limited to provisions for Research, Interpretation, Surveillance and Enforcement, and Administration.

(i) "Permit" means any document issued under Federal or territorial authority, signed by an authorized official, and specifying the permitted actions.

(j) "Permittee" means any person issued a valid permit as defined in paragraph (i) of this section and pursuant to the requirements of these regulations.

(k) "Persons" means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal Government, or any State or local unit of government.

(l) "The Sanctuary" means the Fagatele Bay National Marine Sanctuary.

(m) "Sanctuary Manager" means the person hired by NOAA to manage and operate the Sanctuary.

(n) "Secretary" means the Secretary of Commerce, or his or her successor or designee.

§ 941.6 Management and enforcement.

The National Oceanic and Atmospheric Administration (NOAA) has primary responsibility for the management of the Sanctuary pursuant to the Act. The American Samoa Development Planning Office (DPO) will assist NOAA in the administration of the Sanctuary, and act as the lead agency, in conformance with the Designation Document, these regulations, and the terms and provisions of any grant or cooperative agreement. In accordance with § 922.32(b) of the National Marine Sanctuary Program Regulations, 15 CFR Part 922, NOAA may act to deputize enforcement agents of the American Samoa Government (ASG) to enforce these regulations. If NOAA chooses to exercise this provision, a memorandum of understanding shall be executed between NOAA and the ASG or the person(s) or entity authorized to act on their behalf. Prosecution of violations will be carried out by NOAA in accordance with § 941.10 of these regulations.

§ 941.7 Allowed activities.

All activities except those specifically prohibited by § 941.8 may be carried out within the Sanctuary subject to all prohibitions, restrictions, and conditions imposed by other authorities.

§ 941.8 Activities prohibited or controlled.

(a) Unless permitted by the Assistant Administrator in accordance with § 941.11, or as may be necessary for national defense, or to respond to an emergency threatening life, property or the environment, the following activities are prohibited or controlled in *Subzones A* and *B* of the Sanctuary. All prohibitions and controls will be applied consistently with international law. Refer to § 941.10 for penalties for commission of prohibited acts.

(1) *Taking and Damaging Natural Resources.* (i) No person shall gather, take, break, cut, damage, destroy, or possess any invertebrate, coral, bottom formation, or marine plant.

(ii) No person shall take, gather, cut, damage, destroy, or possess any crown-of-thorns starfish (*Acanthaster planci*).

(iii) No person shall possess or use poisons, electrical charges, explosives, or similar environmentally destructive methods.

(iv) No person shall posses or use spearguns, including such devices known as Hawaiian slings, pole spears, arbalettes, pneumatic and spring-loaded spearguns, bows and arrows, bang sticks, or any similar taking device.

(v) No person shall possess or use seines, trammel nets, or any fixed net.

(vi) There shall be a rebuttable presumption that any items listed in these paragraphs found in the possession of a person within the Sanctuary have been used, collected, or removed from within the Sanctuary.

(2) *Operation of Vessels.* (i) No vessel shall approach closer than 200 feet to a vessel displaying a dive flag except at a maximum speed of three knots.

(ii) All vessels from which diving operations are being conducted shall fly in a conspicuous manner the international code flag alpha "A."

(iii) All vessels shall be operated to avoid striking or otherwise causing damage to the natural features of the Sanctuary.

(3) *Discharges.* No person shall litter, deposit, or discharge any materials or substances of any kind into the waters of the Sanctuary.

(4) *Disturbance of the Benthic Community.* Disturbance of the benthic community by dredging, filling, dynamiting, bottom trawling, or any alteration of the seabed shall be prohibited.

(5) *Removing or Damaging Cultural Resources.* No person shall remove, damage, or tamper with any historical or cultural resource within the boundaries of the Sanctuary.

(6) *Taking of Sea Turtles.* No person shall ensnare, entrap, or fish any sea turtle while it is listed as a threatened or endangered species as defined by the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

(7) *Use of Dangerous Weapons.* Except for law enforcement purposes, no person shall use or discharge explosives or weapons of any description within the Sanctuary boundaries. Distress signaling devices, necessary and proper for safe vessel operation, and knives generally used by fishermen and swimmers are not considered weapons for purposes of this subsection.

(8) *Other Prohibitions.* No person shall mark, deface, or damage in any way, or displace or remove or tamper with any signs, notices, or placards, whether temporary or permanent, or with any monuments, stakes, posts, or other boundary markers related to the Sanctuary.

(b) In addition to those activities prohibited or controlled in accordance with § 941.8(a), the following activities are prohibited or controlled in *Subzone A:*

(1) *Taking and Damaging Natural Resources.* (i) No person shall possess or use fishing poles, handlines, or trawls.

(ii) Commercial fishing shall be prohibited.

(c) The prohibitions in this section are not based on any claim of territoriality and will be applied to foreign persons and vessels only in accordance with recognized principles of international law, including treaties, conventions, and other international agreements to which the United States is signatory.

§ 941.9 Other authorities.

No license, permit or other authorization issued pursuant to any other authority may validly authorize any activity prohibited by § 941.8 unless such activity meets the criteria stated in § 941.11(a), (c) and (d), and is specifically authorized by the Assistant Administrator.

§ 941.10 Penalties for commission of prohibited acts.

Section 307 of the Act, 16 U.S.C. 1437, authorizes the assessment of a civil penalty of not more than $50,000.00 for each violation of any regulation issued pursuant to the Act, and further authorizes a proceeding *in rem* against any vessel used in violation of any such regulation. NOAA will apply to all enforcement matters under the Act the consolidated civil procedure regulations set forth at 15 CFR Part 904.

§ 941.11 Permit procedures and criteria.

(a) Under special circumstances an activity otherwise prohibited by § 941.8 of these regulations may be allowed by permit. The activity must be conducted for research or educational purposes designed to enhance understanding of the Sanctuary environment or to improve resource management decisionmaking. The activity must also be judged not to cause long-term or irreparable harm to the resources of the Sanctuary. A permit may be granted by the Assistant Administrator of NOAA in consultation with the Development and Planning Office.

(b) Any person in possession of a valid permit issued by the Assistant Administrator in accordance with this section may conduct the specified activity in the Sanctuary if such activity is:

(1) Related to research involving Sanctuary resources;

(2) To further the educational value of the Sanctuary; or

(3) For salvage or recovery operations.

(c) Permit applications shall be addressed to the Assistant Administrator for Ocean Services and Coastal Zone Management, ATTN: Sanctuary Programs Division, National Ocean Service, National Oceanic and Atmospheric Administration, 3300 Whitehaven Street, NW., Washington, D.C. 20235. An application shall include a description of all proposed activities, the equipment, methods, and personnel involved, and a timetable for completion of the proposed activity. Copies of all other required licenses or permits shall be attached.

(d) In considering whether to grant a permit, the Assistant Administrator shall evaluate such matters as:

(1) The general professional and financial responsibility of the applicant;

(2) The appropriateness of the methods being proposed for the purpose(s) of the activity;

(3) The extent to which the conduct of any permitted activity may diminish or enhance the value of the Sanctuary as a source of recreation, education, or scientific information; and

(4) The end value of the activity.

(e) In addition to meeting the criteria in § 941.11(a) and (c), the applicant also must demonstrate to the Assistant Administrator that:

(1) The activity shall be conducted with adequate safeguards for the environment; and

(2) The environment shall be returned to, or will regenerate to, the condition which existed before the activity occurred.

(f) In considering an application submitted pursuant to this Section, the Assistant Administrator shall seek and consider the views of the Sanctuary Manager and Director. The Assistant Administrator also may seek and consider the views of any other person or entity, within or outside of the Territorial Government, and may hold a public hearing, as he or she deems appropriate.

(g) The Assistant Administrator may, at his or her discretion, grant a permit which has been applied for pursuant to this section, in whole or in part, and subject the permit to such condition(s) as the Assistant Administrator deems necessary. A permit granted for research related to the Sanctuary may include, but is not limited to, the following conditions:

(1) The Assistant Administrator, Director, or their designated representatives may observe any activity permitted by this section;

(2) Any information obtained in the research site shall be made available to the public; and

(3) The submission of one or more reports of the status of such research activity may be required.

(h) A permit granted pursuant to this section is non-transferrable.

(i) The Assistant Administrator may amend, suspend, or revoke a permit granted pursuant to this section, in whole or in part, temporarily or indefinitely if, in his/her view, the permittee has acted in violation of the terms of the permit or regulations, or for other good cause shown. Any such action shall be communicated in writing to the applicant or permit holder and shall set forth the reason(s) for the action taken. The permittee in relation to whom such action has been taken may appeal the action to the Administrator as provided for in § 941.12.

(Information collection requirements for § 941.11 have been approved by the Office of Management and Budget under control number 0648-0141)

§ 941.12 Appeal of permit action.

(a) Except for permit actions which are imposed for enforcement reasons and covered by the procedures at Subpart D of 15 CFR Part 904, an applicant for a permit, the permittee, or any other interested person (hereafter Appellant) may appeal the granting, denial, conditioning or suspension of any permit under § 941.11 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed and the reason(s) therefor, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Appellant may request an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator may request the Appellant to submit such additional information and in such form as will allow action upon the appeal. The Administrator shall decide the appeal using the criteria set out in § 941.11 (a), (c) and (d) and any information relative to the application on file, any information provided by the Appellant, and such other consideration as is deemed appropriate. The Administrator shall notify the Appellant of the final decision and the reason(s) therefor in writing, normally within 30 days of the date of the receipt of adequate information required to make the decision.

(c) If a hearing is requested, or if the Administrator determines that one is appropriate, the Administrator may grant an informal hearing before a Hearing Officer appointed for that purpose. The Appellant and any other interested persons may appear personally or by counsel at the hearing and submit material and present arguments as determined appropriate by the Hearing Officer. Within 30 days of the last day of the hearing, the Hearing Officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the Hearing Officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the interested persons of his or her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the Hearing Officer. The Administrator's decision shall constitute final action by NOAA for purposes of the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his or her own motion or upon written request from the Appellant, permit applicant or permittee stating the reason(s) therefor.

PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY

Sec.

942.1 Authority.
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APPENDIX I TO PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES.

AUTHORITY: Secs. 303, 304, 305, and 307 of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1433, 1434, 1435, and 1437; section 2 of Pub. L. No. 101-74, 103 Stat. 554; Designation Document for the Cordell Bank National Marine Sanctuary, Article 4, section 1(c).

SOURCE: 54 FR 22423, May 24, 1989, unless otherwise noted.

§ 942.1 Authority.

The Sanctuary has been designated by the designee of the Secretary of Commerce pursuant to the authority of Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.* ("Act"). The regulations in this part are issued pursuant to the authority of sections 303, 304, 305, and 307 of the Act.

§ 942.2 Purpose.

The purpose of designating the Sanctuary is to protect and conserve the special, discrete, highly productive marine area of Cordell Bank and its surrounding waters and to ensure the continued availability of the ecological, research, educational, aesthetic, historical and recreational resources therein.

§ 942.3 Boundary.

The Sanctuary consists of an area of marine waters approximately 50 miles west-northwest of San Francisco, California. The Sancturay consists of a 397.05 square nautical mile area extending at 180° from the northernmost boundary of the Point Reyes-Farallon Islands National Marine Sanctuary (PRNMS) to the 1,000 fathom isobath northwest of the Bank, then south along this isobath to the PRNMS boundary and back to the northwest along this boundary to the beginning point. The boundary coordinates are listed in Appendix I following § 942.10.

§ 942.4 Definitions.

(a) *Act* means Title III of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 16 U.S.C. 1431 *et seq.*

(b) *Administrator* means the Administrator of the National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce, or designee.

(c) *Assistant Administrator* means the Assistant Administrator for Ocean Services and Coastal Zone Management, National Ocean Service, NOAA, or designee.

(d) *Injure* means to change adversely, either in the long- or short-term, a chemical or physical quality of, or the viability of, a Sanctuary resource.

(e) *Person* means any private individual, partnership, corporation, or other entity; or any officer, employee, agent, department, agency or instrumentality of the Federal government, any state or local government, or any foreign government.

(f) *Sanctuary* means the Cordell Bank National Marine Sanctuary.

(g) *Sanctuary resource* means a living or non-living resource of the Sanctuary that contributes to its conservation, recreational, ecological, historical, research, educational, or aesthetic value.

Other terms appearing in these regulations are defined in 15 CFR 922.2.

§ 942.5 Allowed activities.

All activities except those prohibited by § 942.6 may be conducted within the Sanctuary subject to all other prohibitions, restrictions, and conditions imposed by any other authority.

§ 942.6 Prohibited activities.

(a) Except as necessary for national defense, as necessary to respond to an emergency threatening life, property or the environment, or as permitted or certified by the Assistant Administrator in accordance with §§ 942.8 and 942.9, the following activities are prohibited and thus unlawful for any person to conduct:

(1) *Depositing or discharging materials or substances.* (i) Depositing or discharging, from any location within the boundaries of the Sanctuary, materials or substances of any kind except:

(A) Fish, fish parts and chumming materials (bait) produced and discarded during routine fishing activities conducted in the Sanctuary; and

(B) Water (including cooling water) and other biodegradable effluents incidental to use of a vessel in the Sanctuary and generated by: Marine sanitation devices approved by the United States Coast Guard; routine vessel maintenance, *e.g.*, deck wash down; engine exhaust; or meals on board vessels.

(ii) Depositing or discharging, from any location beyond the boundaries of the Sanctuary, materials or substances of any kind, except for the exclusions listed in paragraph (a)(1)(i) of this section, which enter the Sanctuary and injure a Sanctuary resource.

(2) *Removing, taking, or injuring sanctuary resources.* Removing, taking, or injuring or attempting to remove, take, or injure benthic invertebrates or algae located on Cordell Bank or within the 50 fathom isobath surrounding the Bank. There is a rebuttable presumption that any such resource found in the possession of a person within the Sanctuary was taken or removed by that person. This prohibition does not apply to accidental removal, injury, or takings during normal fishing operations.

(3) *Exploring for, or developing or producing, oil, gas, or minerals.* Exploration for, or development or production of, oil, gas, or minerals in any area of the Sanctuary.

(b) All activities being carried out by the Department of Defense (DOD) within the Sanctuary on the effective date of designation that are necessary for national defense are exempt from the prohibitions contained in these regulations. Additional DOD activities initiated after the effective date of designation that are necessary for national defense will be exempted by the Assistant Administrator after consultation between the Department of Commerce and DOD. DOD activities not necessary for national defense, such as routine exercises and vessel operations, are subject to all prohibitions contained in these regulations.

(c) The prohibitions in this section are applicable to foreign persons and foreign flag vessels only to the extent consistent with generally recognized principles of international law, and in accordance with treaties, conventions, and other international agreements to which the United States is a party.

(d) Where necessary to prevent immediate, serious, and irreversible damage to a Sanctuary resource, any activity may be regulated within the limits of the Act on an emergency basis for no more than 120 days.

[54 FR 22423, May 24, 1989, as amended at 54 FR 52343, Dec. 21, 1989]

§ 942.7 Penalties.

(a) Section 307(c) of the Act authorizes the assessment of a civil penalty of not more than $50,000 for each violation of the Act or any regulation or permit issued pursuant to the Act. Each day of a continuing violation constitutes a separate violation. Section 307(c)(3) further authorizes a proceeding *in rem* against any vessel used in such violation and for which a civil penalty has been assessed.

(b) Regulations setting forth the administrative procedures governing the assessment of civil penalties, enforcement hearings and appeals, permit sanctions and denials for enforcement reasons, and the issuance of written warnings appear at 15 CFR part 904.

§ 942.8 Permit applications—procedures and criteria.

(a) If a person wishes to conduct an activity prohibited under § 942.6, that person must apply for, receive, and have in possession on board any vessel used a valid permit issued pursuant to this part authorizing that person to conduct that activity.

(b) Permit applications shall be addressed to the Assistant Administrator, Ocean Services and Coastal Zone Management; ATTN: Marine and Estuarine Management Division, Office of Ocean and Coastal Resource Management, National Ocean Service, National Oceanic and Atmospheric Administration, 1825 Connecticut Avenue NW., Washington, DC 20235. An application shall include a description of all activities proposed, the equipment, methods, and personnel (particularly describing relevant experience) involved, and a timetable for completion of the proposed activity. Copies of all other required permits, licenses, approvals, and other authorizations shall be attached.

(c) Upon receipt of a complete application, the Assistant Administrator may seek the views of any person, within or outside the Federal Government, and may hold a public hearing, at his or her discretion.

(d) The Assistant Administrator, at his or her discretion, may issue a permit subject to such terms and conditions as deemed appropriate, to conduct an activity otherwise prohibited by § 942.6, if the Assistant Administrator finds that the activity will further research related to Sanctuary resources; further the educational or historical value of the Sanctuary; further salvage or recovery operations in or near the Sanctuary in connection with a recent air or marine casualty; or assist in the management of the Sanctuary. In deciding whether to issue a permit, the Assistant Administrator may consider such factors as the professional qualifications and financial ability of the applicant as related to the proposed activity; the appropriateness of the methods and procedures proposed by the applicant for the conduct of the activity; the extent to which the conduct of the activity may diminish or enhance the values for which the Sanctuary was designated; and the end value of the applicant's overall activity.

(e) A permit issued pursuant to this section is nontransferable.

(f) The Assistant Administrator may amend, suspend or revoke a permit issued pursuant to this subsection, in whole or in part, if the Assistant Administrator determines that the permittee has acted in violation of the terms or conditions of the permit or of these regulations or that other good cause exists for amending, suspending or revoking the permit. Any such action shall be communicated in writing to the permittee, and shall set forth the reason(s) for the action taken. Procedures governing permit sanctions and denials for enforcement reasons are found at subpart D of 15 CFR part 904.

§ 942.9 Certification of other authorizations.

(a) All permits, licenses, approvals, and other authorizations issued pursuant to any authority are valid within the Sanctuary subject only to the prohibitions set forth in § 942.6. All applicable regulatory programs remain in effect.

(b) A permit, license, approval, or other authorization allowing the discharge or deposit of materials or substances otherwise prohibited under § 942.6(a)(1), or the removal, taking, or injury of, or attempt to remove, take, or injure benthic invertebrates or algae otherwise prohibited under § 942.6(a)(2) shall be valid if certified by the Assistant Administrator as consistent with the purpose of the Sanctuary and having no significant effect on Sanctuary resources. Such certification may impose terms and conditions as deemed appropriate to ensure consistency.

(c) In considering whether to make the certifications called for in this section, the Assistant Administrator may seek and consider the views of any other person, within or outside the Federal government, and may hold a public hearing as deemed appropriate.

(d) Any certification called for in this section shall be presumed unless the Assistant Administrator acts to deny or condition the certification within 60 days from the date that the Assistant Administrator receives notice of the permit, license, approval, or other authorization, and the supporting data deemed necessary by the Assistant Administrator in order to make a decision on the certification.

(e) The Assistant Administrator may amend, suspend, or revoke any certification made under this section whenever the continued conduct of the activity would violate any terms or conditions of the certification. Any such action shall be communicated in writing to both the holder of the certified permit, license, approval, or other authorization and the issuing agency and shall set forth reason(s) for the action taken.

(f) Either the holder or the issuing agency may appeal any action conditioning, denying, amending, suspending, or revoking any certification in accordance with the procedure provided for in § 942.10.

§ 942.10 Appeals of administrative action.

(a) Except for permit actions taken for enforcement reasons and therefore covered by the procedures at subpart D of 15 CFR part 904, an applicant for a permit, a permittee, or any other interested person (hereinafter appellant) may appeal the grant, denial, conditioning, amendment, suspension, or revocation of any permit under § 942.8 to the Administrator of NOAA. In order to be considered by the Administrator, such appeal must be in writing, must state the action(s) appealed and the reason(s) therefor, and must be submitted within 30 days of the action(s) by the Assistant Administrator. The Administrator, in his or her discretion, may hold an informal hearing on the appeal.

(b) Upon receipt of an appeal authorized by this section, the Administrator may request the appellant, the permit applicant or permittee, if other than the appellant, or any person, within or outside the Federal government, to submit such information as the Administrator may deem appropriate in order to decide the appeal. The Administrator shall decide the appeal based on the record before the Assistant Administrator and the record of the appeal. The Administrator shall notify the appellant and other interested persons of the final decision and the reason(s) therefor in writing, normally within 30 days of the date of the receipt of adequate information to make the decision.

(c) If the Administrator determines that an informal hearing should be held, the Administrator may designate an officer before whom the hearing shall be held. Notice of the time, place, and subject matter of the hearing shall be published in the FEDERAL REGISTER. Such hearing shall be held no later than 30 days following publication of the notice in the FEDERAL REGISTER, unless the hearing officer extends the time for reasons deemed equitable. The appellant, the applicant or permittee and other interested persons may appear personally or by counsel at the hearing and submit such material and present such arguments as determined appropriate by the hearing officer. Within 30 days of the conclusion of the hearing, the hearing officer shall recommend a decision in writing to the Administrator.

(d) The Administrator may adopt the hearing officer's recommended decision, in whole or in part, or may reject or modify it. In any event, the Administrator shall notify the appellant and other interested persons of his/her decision, and the reason(s) therefor in writing within 30 days of receipt of the recommended decision of the hearing officer. The Administrator's decision shall constitute final agency action for the purposes of the Administrative Procedure Act.

(e) Any time limit prescribed in this section may be extended by the Administrator for good cause for a period not to exceed 30 days, either upon his/her own motion or upon written request from the appellant, permit applicant or permittee, stating the reason(s) therefor.

APPENDIX I TO PART 942—CORDELL BANK NATIONAL MARINE SANCTUARY BOUNDARY COORDINATES

Point No.	Latitude	Longitude
1	38°15'51.72"	123°10'52.44"
2	38°07'55.88"	123°38'33.53"
3	38°06'45.21"	123°38'00.40"
4	38°04'58.41"	123°37'14.34"
5	38°04'28.22"	123°37'17.83"
6	38°03'42.75"	123°36'55.66"
7	38°03'11.10"	123°36'19.78"
8	38°02'46.12"	123°36'21.98"
9	38°02'02.74"	123°35'56.56"
10	38°01'27.10"	123°35'55.12"
11	38°01'22.28"	123°36'55.13"
12	38°01'11.54"	123°37'28.21"
13	38°00'49.16"	123°37'29.77"
14	37°59'54.49"	123°36'47.90"
15	37°59'12.39"	123°35'59.55"
16	37°58'39.40"	123°35'14.85"
17	37°58'00.57"	123°34'42.90"
18	37°57'18.99"	123°33'43.15"
19	37°56'56.42"	123°32'51.97"
20	37°56'18.90"	123°32'49.24"
21	37°55'22.37"	123°32'36.96"
22	37°54'26.10"	123°32'21.73"
23	37°53'07.46"	123°31'46.81"
24	37°52'34.93"	123°31'18.90"
25	37°51'42.81"	123°31'19.10"
26	37°50'59.58"	123°31'02.96"
27	37°48'49.14"	123°28'44.61"
28	37°49'22.64"	123°29'34.07"
29	37°48'49.14"	123°28'44.61"
30	37°48'36.95"	123°28'08.29"
31	37°48'03.37"	123°28'23.27"
32	37°47'41.54"	123°28'01.97"
33	37°47'01.78"	123°27'16.78"
34	37°46'51.92"	123°26'48.98"
35	37°46'13.20"	123°26'04.79"
36	37°46'00.73"	123°25'36.99"
37	37°50'25.31"	123°25'26.53"
38	37°54'32.28"	123°23'16.49"
39	37°57'45.71"	123°19'17.72"
40	37°59'29.27"	123°14'12.16"
41	37°59'43.71"	123°08'27.55"
42	38°03'10.20"	123°07'44.35"
43	38°04'01.64"	123°06'58.92"
44	38°06'33.32"	123°04'56.24"
45	38°12'42.06"	123°07'10.21"

SUBCHAPTER B—[RESERVED]

SUBCHAPTER C—GENERAL REGULATIONS OF THE NATIONAL WEATHER SERVICE

PART 945—RULES FOR GUIDANCE OF THE PUBLIC

ec.
45.1 Connections to weather communications systems.
45.2 Time of release of weather information affecting crops.
45.3 False weather reports.
45.4 Certified data for use in court.
45.5 Appearance in court of weather bureau employees.
45.6 Agreements for radio and television weather broadcasts.

Authority: Sec. 3, 26 Stat. 653; 15 U.S.C. 13.

Source: 32 FR 16258, Nov. 29, 1967; 35 FR 9249, Dec. 19, 1970, unless otherwise noted.

945.1 Connections to weather communications systems.

The National Weather Service uses a umber of federally operated weather ommunications systems in support of ts internal operations. Connections to hese circuits, for receiving purposes nly, are permitted to be made by ualified organizations or individuals. Application to connect to these circuits should be made to the Director, National Weather Service, Silver Spring, Md. 20910.

§ 945.2 Time of release of weather information affecting crops.

(a) Bulletins or radio broadcasts giving agricultural weather information are released at 10 a.m. each workday during the growing season in the affected areas.

(b) Weekly Weather and Crop Bulletins containing a synopsis of weather conditions and their effect on crops and farming operations (which show snow and ice conditions during the season) are released simultaneously at Washington, DC, and approximately 45 field stations at 12 noon e.s.t., on Tuesday, or on Wednesday if Monday or Tuesday is a holiday.

(c) Because of the influence that might be exerted upon the market value of the products of the soil by the information contained in the weather and crop bulletins, the law provides a fine of $10,000 or imprisonment of 10 years, or both, for any responsible Government official who wilfully imparts any information of speculative value contained in the bulletins before the times of release to the public (18 U.S.C. 1902).

§ 945.3 False weather reports.

Whoever knowingly issues or publishes any counterfeit forecast or warning of weather conditions falsely representing such forecast or warning to have been issued or published by the National Weather Service * * * shall be fined not more than $500, or imprisoned not more than 90 days, or both (18 U.S.C. 2074).

§ 945.4 Certified data for use in court.

(a) 28 U.S.C. 1733 provides that authenticated copies of any books, records, papers, or other documents in any of the executive departments shall be admitted in evidence in courts of law equally with the originals thereof.

(b) All field stations and the Washington office are prepared to furnish applicants with duly certified copies of original or published weather records that are necessary for legal purposes, upon payment of appropriate fees to recover the reproduction, certification, and other related costs.

§ 945.5 Appearance in court of weather bureau employees.

In all cases of private litigation where it is required that an employee produce records or testify, it is necessary that he be duly subpoenaed to appear in court as an official of the Service. As the Federal government will be deprived of his services while so testifying, the employee will collect the authorized witness fees and allowances for expenses of travel and subsistence, all of which he is required to account for to the Service. Arrangements should be made with the court to set a time for the appearance of an employee that will not interfere with important duties that would result in injury to interests of the community by delay in issuing important weather forecasts and danger warnings (15 Comp. Gen. 196).

§ 945.6 Agreements for radio and television weather broadcasts.

(a) Radio stations often desire to make special arrangements for the broadcast of daily weather forecasts, special warnings, and other weather information under commercial sponsorship. In such cases the National Weather Service obtains an agreement setting forth conditions under which the broadcasts are to be made. This agreement specifies the regular time schedules of the broadcast; that the information be given exactly as issued by the Service; that while it is permissible to announce immediately before and at the conclusion of the weather broadcast that it is furnished by the courtesy of a sponsor, care must be exercised to avoid the implication that the forecasts are made or paid for by the advertiser; and that there shall be nothing in the announcement associated with weather broadcasts to indicate that the National Weather Service or the Government endorses the sponsor or the product advertised.

(b) An agreement is also required between the National Weather Service and any radio or television station that wishes to install equipment or make other arrangements for direct broadcasts from a National Weather Service office.

(c) No charge is made to the radio or television stations or the sponsor for weather information intended for public distribution. However, if there are communication tolls or leased wire charges in connection with the delivery of such information to the radio or television stations, such charges are borne by the radio or television stations or the sponsor.

SUBCHAPTER D—GENERAL REGULATIONS OF THE ENVIRONMENTAL DATA SERVICE

PART 950—ENVIRONMENTAL DATA AND INFORMATION

Sec.
950.1 Scope and purpose.
950.2 Environmental Data and Information Service (EDIS).
950.3 National Climatic Center (NCC).
950.4 National Oceanographic Data Center (NODC).
950.5 National Geophysical and Solar-Terrestrial Data Center (NGSDC).
950.6 Environmental Science Information Center (ESIC).
950.7 Center for Environmental Assessment Services (CEAS).
950.8 Satellite Data Services Division (SDSD).
950.9 Computerized Environmental Data and Information Retrieval Service.

AUTHORITY: (5 U.S.C. 552, 553). Reorganization Plan No. 4 of 1970.

SOURCE: 44 FR 54468, Sept. 20, 1979, unless otherwise noted.

§ 950.1 Scope and purpose.

This part describes the Environmental Data and Information Service (EDIS), a major program element of the National Oceanic and Atmospheric Administration, and EDIS management of environmental data and information.

§ 950.2 Environmental Data and Information Service (EDIS).

The Environmental Data and Information Service is the first Federal organization created specifically to manage environmental data and information. EDIS acquires, processes, archives, analyzes, and disseminates worldwide environmental (atmospheric, marine, solar, and solid Earth) data and information for use by commerce, industry, the scientific and engineering communities, and the general public, as well as by Federal, State, and local governments. It also provides experiment design and data management support to large-scale environmental experiments; assesses the impact of environmental fluctuations on food production, energy production and consumption, environmental quality, and other economic systems; and manages or provides functional guidance for NOAA's scientific and technical publication and library activities. In addition, EDIS operates related World Data Center-A subcenters and participates in other international data and information exchange programs. To carry out this mission, EDIS operates a network of specialized service centers and a computerized environmental data and information retrieval service.

§ 950.3 National Climatic Center (NCC).

The National Climatic Center acquires, processes, archives, analyzes, and disseminates climatological data; develops analytical and descriptive products to meet user requirements; and provides facilities for the World Data Center-A (Meteorology). It is the collection center and custodian of all United States weather records, the largest of the EDIS centers, and the largest climatic center in the world.

(a) Climatic data available from NCC include:

(1) Hourly Surface Observations from Land Stations (ceiling, sky cover, visibility, precipitation or other weather phenomena, obstructions to vision, pressure, temperature, dew point, wind direction, wind speed, gustiness).

(2) Three-Hourly and Six-Hourly Surface Observations from Land Stations, Ocean Weather Stations, and Moving Ships (variable data content).

(3) Upper Air Observations (radiosondes, rawinsondes, rocketsondes, low-level soundings, pilot balloon winds, aircraft reports).

(4) Radar Observations (radar log sheets, radar scope photography).

(5) Selected Maps and Charts (National Meteorological Center products).

(6) Derived and Summary Data (grid points, computer tabulations, digital summary data).

(7) Special Collections (Barbados Oceanographic and Meteorological Experiment meteorological data, Global Atmospheric Research Program basic

data set, solar radiation data, many others).

(b) Queries should be addressed to: National Climatic Center, National Oceanic and Atmospheric Administration, Asheville, NC 28801, tel. 704-258-2850, Ext. 683.

§ 950.4 National Oceanographic Data Center (NODC).

The National Oceanographic Data Center acquires, processes, archives, analyzes, and disseminates oceanographic data; develops analytical and descriptive products to meet user requirements; and provides facilities for the World Data Center-A (Oceanography). It was the first NODC established and houses the world's largest usuable collection of marine data.

(a) Oceanographic data available from NODC include:

(1) Mechanical and expendable bathytheremograph data in analog and digital form.

(2) Oceanographic station data for surface and serial depths, giving values of temperature, salinity, oxygen, inorganic phosphate, total phosphorus, nitrite-nitrogen, nitrate-nitrogen, silicate-silicon, and pH.

(3) Continuously recorded salinity-temperature-depth data in digital form.

(4) Surface current information obtained by using drift bottle or calculated from ship set and drift.

(5) Biological data, giving values of plankton standing crop, chlorophyll concentrations, and rates of primary productivity.

(6) Other marine environmental data obtained by diverse techniques, e.g., instrumented buoy data, and current meter data.

(b) Queries should be addressed to: National Oceanographic Data Center, National Oceanic and Atmospheric Administration, Washington, DC 20235, tel. 202-634-7500.

§ 950.5 National Geophysical and Solar-Terrestrial Data Center (NGSDC).

The National Geophysical and Solar-Terrestrial Data Center acquires, processes, archives, analyzes, and disseminates solid Earth and marine geophysical data as well as ionospheric, solar, and other space environment data; develops analytical, climatological, and descriptive products to meet user requirements; and provides facilities for World Data Center-A (Solid-Earth Geophysics, Solar Terrestrial Physics, and Glaciology).

(a) Geophysical and solar-terrestrial data available from NGSDC include:

(1) *Marine geology and geophysics.* Bathymetric measurement; seismic reflection profiles; gravimetric measurements; geomagnetic total field measurements; and geological data, including data on heat flow, cores, samples, and sediments.

(2) *Solar-Terrestrial physics.* Ionosphere data, including ionograms, frequency plots, riometer and field-strength strip charts, and tabulations; solar activity data; geomagnetic variation data, including magnetograms; auroral data; cosmic ray data; and airglow data.

(3) *Seismology.* Seismograms; accelerograms; digitized strong-motion accelerograms; earthquake data list (events since January 1900); earthquake data service with updates on a monthly basis.

(4) *Geomagnetic main field.* Magnetic survey data and secular-change data tables.

(b) Queries should be addressed to: National Geophysical and Solar-Terrestrial Data Center, National Oceanic and Atmospheric Administration, Boulder, CO 80303, tel. 303-499-1000, ext. 6215.

§ 950.6 Environmental Science Information Center (ESIC).

ESIC is NOAA's information specialist, librarian, and publisher. ESIC coordinates NOAA's library and information services and its participation in the national network of scientific information centers and libraries. Computerized literature searches provide information from over 80 data bases. The complete list of data bases is available on request. All ESIC information facilities provide the normal library tailored information and reference services. As NOAA's publisher of scientific and technical information, ESIC reviews, edits, and processes NOAA manuscripts for publication.

(a) Services available from ESIC include:

(1) *Reference services.* Some services are provided on a cost-recovery basis to non-NOAA individuals.

(2) *Publication copy services.* Copies of NOAA publications are provided on request from qualified users, including governments, universities, non-profit organizations, professional societies, chambers of commerce, public information media, and individuals and organizations having cooperative or exchange agreements with NOAA.

(3) *Bibliographies.* Special bibliographies are prepared on request. When provided to non-NOAA individuals, service is on a full cost-recovery basis.

(4) *Current awareness services.* Periodically provides announcements of titles of newly published NOAA scientific and technical publications.

(5) *Lending services.* Materials are loaned to other libraries and to NOAA employees.

(6) On-site use of library collections.

(7) *Publishing services.* Includes providing refereeing, reviewing, editing, and publishing services for NOAA authors of manuscripts destined for both NOAA and non-NOAA publication series.

(b) Queries should be addressed to: Environmental Science Information Center, National Oceanic and Atmospheric Administration, Rockville, MD 20852, tel. 301-443-8137.

§ 950.7 Center for Environmental Assessment Services (CEAS).

EDIS assists National decision-makers in solving problems by providing data analyses, applications, assessments, and interpretations to meet their particular requirements. Many of these services are provided by the EDIS Center for Environmental Assessment Services (CEAS).

(a) The following are examples of CEAS projects and services:

(1) CEAS prepares data-based studies and weekly assessments of potential effects of climatic fluctuations on National and global grain production.

(2) CEAS provides environmental analyses and assessments to support efficient and effective planning, site selection, design, construction, and operation of supertanker ports and offshore drilling rigs. Such planning depends heavily upon environmental assessments.

(3) During the heating season, CEAS issues monthly and seasonal projections of natural gas demand for multi-State regions of the conterminous United States. Similar projections are made for electricity during the cooling season.

(4) CEAS has developed and makes available when needed a statistical oil spill trajectory risk model based on historical meteorological and oceanographic data.

(5) The center has analyzed the potential ecological effects of the planned disposal of huge volumes of saturated brine into Gulf waters for the National Strategic Petroleum Reserve and may be called on to provide similar services in other subject areas.

(6) CEAS provides experiment design, data analysis, and data management support to project managers and produces merged, validated multidisciplinary data sets for international and national study (such undertakings as the recent key role in the Global Atmospheric Research Program (GARP) experiments).

(7) CEAS provides special data or information as required. Currently the Center is assembling an inventory of cruises and a global oceanographic data base from observations taken during the First GARP Global Experiment (FGGE).

(b) Additional information on these or related services can be obtained by writing: Director, Center for Environmental Assessment Services, National Oceanic and Atmospheric Administration, Washington, DC 20235; or by calling (202) 634-7251.

§ 950.8 Satellite Data Services Division (SDSD).

The Satellite Data Services Division of the EDIS National Climatic Center provides environmental and earth resources satellite data to other users once the original collection purposes (i.e., weather forecasting) have been satisfied. The division also provides photographs collected during NASA's SKYLAB missions.

(a) Satellite data available from SDSD include:

(1) Data from the TIROS (Television InfraRed Observational Satellite) series of experimental spacecraft; much of the imagery gathered by spacecraft of the NASA experimental NIMBUS series; full-earth disc photographs from NASA's Applications Technology Satellites (ATS) I and III geostationary research spacecraft; tens of thousands of images from the original ESSA and current NOAA series of Improved TIROS Operational Satellites; and both full-disc and sectorized images from the Synchronous Meteorological Satellites (SMS) 1 and 2, the current operational geostationary spacecraft. In addition to visible light imagery, infrared data are available from the NIMBUS, NOAA, and SMS satellites. Each day, SDSD receives about 239 negatives from the polar-orbiting NOAA spacecraft, more than 235 SMS-1 and 2 negatives, and several special negatives and movie film loops.

(2) Photographs (both color and black-and-white) taken during the three SKYLAB missions (May through June, 1973, July through September, 1973, and November 1973 through February 1974).

(b) Queries should be addressed to: Satellite Data Services Division, World Weather Building, Room 606, Washington, DC 20233, tel. 301-763-8111.

§ 950.9 Computerized Environmental Data and Information Retrieval Service.

The Environmental Data Index (ENDEX) provides rapid, automated referral to multidiscipline environmental data files of NOAA, other Federal agencies, state and local governments, and universities, research institutes, and private industry. A computerized, information retrieval service provides a parallel subject-author-abstract referral service. A telephone call to any EDIS data or information center or NOAA library will allow a user access to these services.

PART 960—LICENSING OF PRIVATE REMOTE-SENSING SPACE SYSTEMS

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Subpart A—General

§ 960.1 Purpose.

These regulations establish the minimum practicable procedures and informational requirements to license and supervise the operation of a private remote-sensing space system under Title IV of the Land Remote-Sensing Commercialization Act of 1984 (The Act). They are intended to facilitate the policy of the Act by encouraging development of private sector-owned remote-sensing space systems and promotion of commercialization of land remote-sensing systems in the United States while complying with the requirements of the Act, including:

(a) To preserve and promote the national security of the United States;

(b) To ensure that data from private operational remote-sensing space systems will be sold on a nondiscriminatory basis; and

(c) To fulfill the international obligations of the United States.

To the extent there is a tension between the policy of promoting the commercial use of remote-sensing systems and the policies of promoting national security interests as determined by the Secretary of Defense or international obligations as determined by the Secretary of State, the Secretary of Commerce may, in his or her discretion, undertake reasonable efforts to satisfactorily resolve the matter in favor of commercialization.

§ 960.2 Scope.

The Act and these regulations apply to any person subject to the jurisdiction or control of the United States who operates a private remote-sensing space system either directly or through an affiliate or subsidiary. For the purposes of these regulations, a person, affiliate, or subsidiary is subject to the jurisdiction or control of the United States if such person is:

(a) An individual who is a citizen of the United States;

(b) A corporation, partnership, association or other entity organized or existing under the laws of the United States or any state, territory or possession thereof; or

(c) Any other private space system operator having substantial connections with the United States or deriving substantial benefits from U.S. law that support its international remote-sensing operations. Relevant connections include using a U.S. launch vehicle and/or platform, operating a spacecraft command and/or data acquisition station in the U.S., and processing the data at and/or marketing it from facilities within the U.S. The following examples are intended to illustrate the application of this paragraph.

EXAMPLE 1: A non-U.S. corporation launches an operational remote-sensing space system using a U.S. operated launch vehicle and/or a platform launched from U.S. territory. The company operates no spacecraft command ground station in the U.S. although it has technicians and supervisors present in the U.S. to ensure integration of the foreign-built satellite or space system with the launch vehicle. The company acquires data directly from the space system and processes and distributes it from facilities outside the U.S., although it advertises the availability of data and/or information in U.S. publications.

The company is not subject to U.S. jurisdiction or control and requires no license for its remote-sensing activities.

EXAMPLE 2: A company's operation is the same as in Example 1 except that it acquires, processes and distributes the data to U.S. and foreign customers from one or more facilities within the U.S.

The company is subject to U.S. jurisdiction or control and requires a license.

Where ground activities in the U.S. are less extensive than those described above, such as mere operation of a data acquisition facility or a small retail distribution outlet for U.S. customers, the Administrator will decide on an individual basis whether the operator is subject to U.S. jurisdiction or control for purposes of Title IV. In such cases, the use of a U.S. launch vehicle and/or platform may be significant although such use alone is not a sufficient connection.

Interested persons with questions may request a formal, binding opinion from the Administrator concerning the application of these regulations to their operation. Informal opinions by agencies should not be relied upon.

§ 960.3 Definitions.

For purposes of these regulations, the following terms have the following meanings:

Act means the Land Remote-Sensing Commercialization Act of 1984 (Pub. L. 98-365, 15 U.S.C. 4201 *et seq.*);

Administrator means the adinistrator of NOAA, or his designee;

Affiliate means any person: (a) Which owns or controls more than 5% interest in the applicant or licensee, or (b) which is under common ownership or control with the applicant or licensee;

Application means any written request submitted under this part for: (a) Issuance of a license for the operation of a private remote-sensing space system; (b) transfer or renewal of any such license; or (c) an amendment to any such license as a result of a substantial change in any of the specified terms and conditions of the license;

Basic data set means data collected by any licensed private remote-sensing space system that (a) has been selected to be maintained by the United

States Government in a pubic archive, and (b) shall remain distinct from any inventory of data that a system operator may maintain for sales and for other purposes. Section 602 of the Act ("Archiving of Data") sets forth the Government's interest and criteria for determining the "basic data set;"

Experimental data means data collected by the United States Government in experimental remote-sensing programs;

Measured values mean the assigned numbers, shades or colors, which represent, in some standardized system, an amount of electromagnetic radiation sensed in a spectral band.

NESDIS means the National Environmental Satellite, Data, and Information Service;

NOAA means the National Oceanic and Atmospheric Administration;

Person means any individual (whether or not a citizen of the United States), corporation, partnership, association, or other entity organized or existing under the laws of any nation. "Person" does not include any government or intergovernmental organization or agency thereof.

Remote-sensing space system means any instrument or device or combination thereof and any related ground based facilities capable of sensing the Earth's surface from space by making use of the properties of the electromagnetic waves emitted, reflected, or diffracted by the sensed objects. For purposes of these regulations, small, hand-held cameras shall not be considered remote-sensing space systems.

Subsidiary means an entity whose controlling interest is held by the applicant or licensee.

Unenhanced data means unprocessed or minimally processed signals or film collected from a licensed remote-sensing space system, or minimally processed film products derived from such signals. Such mimimal processing includes but is not limited to rectification of distortions, registration with respect to features of the Earth, and calibration of spectral response. Such minimal processing does not include conclusions, substantial and irreversible manipulations, or calculations derived from such signals or film products or the combination of the signals or film products with other data or information in such manner as to effect a substantial and irreversible modification thereof.

Value-added activity means any activity that substantially and irreversibly changes the information content of the unenhanced data by: (a) Altering or replacing the measured values of an unenhanced data product or (b) combing unenhanced signals or film products with other data or information. Production of unenhanced data products through minimal processing of signals and converting assigned values from one unit of measurement to another do not constitute value-added activities. Increasing the marketability or the price of an unenhanced data product does not by itself constitute a value-added activity. The product derived may be for sale, for any other form of distribution, or for the internal use of the system operator.

Subpart B—Application Process

§ 960.4 Pre-application consultation.

(a) Applicants are encouraged to consult with NOAA and other relevant federal agencies at the earliest possible planning stages. Such consultation may reveal design or data collection requirements that may be accommodated early at low cost or avoid costly changes in design or data collection characteristics. Consultation at the time a license application is being prepared may prove useful in defining informational requirements and in expediting review.

(b) *Consultation.* The Administrator shall consult upon request with any prospective applicant to assist the applicant in

(1) Properly preparing the application, and

(2) Contacting other Government agencies involved in the application review process in order to discuss the prospective application.

(c) *Request.* A prospective applicant who wishes to have a pre-application consultation should make such request in writing to the Assistant Administrator, National Environmental Satellite, Data and Information Service, Washington, DC 20233.

§ 960.5 General.

(a) *Where to file.* Applications and all related documents shall be filed with the Assistant Administrator, National Environmental Satellite, Data, and Information Service (NESDIS), NOAA, Washington, DC 20233.

(b) *Form.* No particular form is required but each application must be in writing, must include all of the information specified in this subpart, and must be signed as follow:

(1) For a corporation: By a principal executive officer at least the level of vice-president.

(2) For a partnership or a sole proprietorship: By a general partner or proprietor, respectively, or by any authorized principal executive officer of any corporate general partner.

(3) For an association or other entity: By a principal executive officer.

(c) *Number of copies.* Eight (8) copies of each application must be submitted.

§ 960.6 Information to be submitted with application.

The following information on the applicant, and its affiliates and subsidiaries shall be provided by the applicant:

(a) The name, mailing address, telephone number and citizenship of the applicant and any affiliates or subsidiaries, and of each director or owner of greater than five (5) percent interest.

(b) A copy of the charter or instrument by which the applicant was formed and authorized to do business. If the applicant is a corporation its charter shall be certified by the Secretary of State or other appropriate authority of the jurisdiction in which incorporated.

(c) The name, address, and telephone number of a person upon whom service of all documents may be made.

(d) Adequate operational information regarding the applicant's remote-sensing space system on which to base review to ensure compliance with national security and international requirements including,

(1) The date of intended commencement of operations and the expected duration of such operations;

(2) The method of launch, and the name and location of the operator of the launch vehicle and the launch site;

(3) The range of orbits and altitudes requested for authorized operation;

(4) The range of spatial resolution or instantaneous field of view requested; and

(5) The spectral bands requested for authorized operation.

The applicant may wish to include information concerning the extent to which data to be acquired from the applicant's system could be acquired from foreign competitors who are not subject to these regulations.

(e) The applicant's intended data acquisition and distribution plans, including:

(1) Plans for data transmission to the ground;

(2) Method of data distribution including scheduling plans and procedures;

(3) Location of major data distribution outlets;

(4) Data reproduction policy;

(5) Pricing policy;

(6) The names and addresses of any parties that will engage in the marketing of data on a contractual basis with the applicant, or its affiliates and subsidiaries; and

(7) Any other information necessary to satisfy the requirements of section 601 of the Act.

(f) Any plans that the applicant, or any affiliate or subsidiary may have for engaging in value-added activities, including a plan and pricing policy for ensuring nondiscriminatory access to unenhanced data.

(g) All existing or anticipated agreements regarding system operation between the applicant, its affiliates and subsidiaries, and any foreign nation, entity or consortium.

(h) Proposed method of disposition of any remote-sensing satellites owned or operated by the applicant.

In the case of an application for an amendment to an existing license, only modifications or additions to previously submitted information need be provided.

§ 960.7 Amendment, withdrawal, and termination of an application.

(a) If information in an application becomes materially inaccurate or incomplete after it is filed but before the license application proceeding is completed, the applicant must promptly file an amendment that contains the corrected or additional information. The applicant should follow the procedures specified in § 960.5 for an original filing.

(b) If the Administrator determines that any amendment constitutes a major and substantial change to the applicant's original proposal, the Administrator may:

(1) Incorporate the amendment into the original application and, if necessary, extend the time period prescribed in the Act and in these regulations for processing the application by no more than 60 days; or

(2) Require the applicant to submit a new license application.

(c) An applicant may withdraw an application at any time before the license application review is completed by delivering or mailing a written notice of withdrawal to the Administrator.

(d) The Administrator shall terminate review of a license application if:

(1) The application is withdrawn before the decision approving or denying it is issued; or

(2) The applicant, after written notice by the Administrator pursuant to § 960.9(c), does not provide adequate additional information to complete the application within the time stated in the written notice.

§ 960.8 Confidentiality of information.

(a) Any person who submits information pursuant to this part, considered to be a trade secret, or commercial or financial information that is privileged or confidential, may request in writing that the information be given confidential treatment. Such request should:

(1) Be submitted at the time of submission of the information; and

(2) State the period of time for which confidential treatment is desired (e.g., until a certain date, or until the occurrence of a certain event, or permanently).

(b) Information for which confi
tial treatment is requested must
clearly marked with a legend such
"Proprietary Information" or "Co
dential Treatment Requested." Wh
such marking proves impracticabl
cover sheet containing such leg
must be securely attached.

(c) If a request for confiden
treatment is received after the inf
mation itself is received, NESDIS
try to associate the request with cop
of the information, but cannot guar
tee that such efforts will be effecti

(d) Any request for confident
treatment may include a written ju
fication, stating why the informati
is a trade secret, or commercial or
nancial information that is privileg
or confidential, and describing:

(1) The commercial or financ
nature of the information;

(2) The nature and extent of t
competitive advantage enjoyed as
result of possession of the inform
tion;

(3) The nature and extent of t
competitive harm that would resu
from public disclosure of the inform
tion;

(4) The extent to which the inform
tion has been disseminated to emplo
ees and contractors of the person su
mitting the information;

(5) The extent to which person
other than the person submitting th
information possess, or have access t
the same information; and

(6) The nature of the measures tha
have been and are being taken to pr
tect the information from disclosure.

(e) Request for disclosure.

(1) Requests for disclosure of infor
mation submitted, reported, or collect
ed pursuant to this part shall be in ac
cordance with 15 CFR 903.7.

(2) NOAA will not usually determine whether confidential treatment is warranted until it receives a request for disclosure of the information, unless it would encourage the submission of information not required to be submitted under this part.

(3) Upon receipt of a request for disclosure of information for which confidential treatment has been requested, the Administrator will notify immediately the person who submitted the information and:

(i) Inform such person of the date by which NOAA must determine whether confidential treatment is warranted in order to comply with the request for disclosure (usually within 10 working days of receipt of the request); and

(ii) Inquire whether such person continues to request confidential treatment.

(4) If the person waives or withdraws a request for confidential treatment in full or in part, the person shall deliver to NOAA a written statement to that effect. If the person confirms the request for confidential treatment, such person is strongly encouraged to deliver to NOAA a written statement in sufficient time for NOAA to fully consider it in making its formal determination (generally, not later than the close of business on the fourth working day after being notified under paragraph (e)(3) of this section). Such statement may:

(i) Address the issues listed in paragraph (d) of this section, describing the basis for believing that the information is deserving of confidential treatment, if such a statement was not previously submitted;

(ii) Update or supplement any statement previously submitted under paragraph (d) of this section; and

(iii) Present arguments against disclosure of the information.

(5) To the extent permitted by applicable law, part or all of any statement submitted under this section will be treated as confidential if so requested by the person submitting the response.

§ 960.9 Review procedures.

(a) The Administrator shall immediately forward a copy of any application or a summary thereof to the Department of Defense, the Department of State, and any other Federal agencies determined to have a substantial interest in the proposed activity, such as the National Aeronautics and Space Administration, and the Department of Transportation. The Administrator shall advise such agencies of the deadline prescribed by paragraph (b) of this section to require additional information from the applicant.

(b) Within 21 days after the receipt of an application, the Administrator shall determine whether the application appears to contain all of the information required by Subpart B of these regulations. In making this determination the Administrator shall consider timely comments provided by the Federal agencies consulted under paragraph (a) of this section.

(c) If the Administrator determines that all of the required information is not contained in the application, the Administrator may require by written notice to the applicant, that the applicant file further information, analysis, or explanation.

(d) If the Administrator requires further information under paragraph (c) of this section, the time limitations prescribed by section 401(c) of the Act do not begin to run until the date on which the Administrator determines that the application appears to be complete and so notifies the applicant.

(e) Within sixty days of receipt of a complete application, each Federal agency consulted under paragraph (a) of this section shall recommend approval or disapproval of the application in writing.

(1) If the Secretary of Defense or the Secretary of State determines that the application may not be approved without modifications or conditions consistent with national security concerns or international obligations, the determination shall clearly state why the modifications or conditions are necessary to accomplish the intended purpose.

(2) If any other agency recommends disapproval, it shall state why it believes the application does not comply with any law or regulation within its area of responsibility and how it believes the application may be amended or the license conditioned to comply with the law or regulation in question.

(f) All determinations and recommendations shall be made a part of the public record for that application. If the recommendation contains classified material, the public record shall reflect at what point in the document deletions have been made.

§ 960.10 Timely approval or denial of application and issuance of license.

(a) The Administrator shall approve or deny a complete application as soon as practicable. If final action has not occurred within one hundred and twenty days after receipt, the Administrator shall inform the applicant of any pending issues and of actions required to resolve them.

(b) If the Administrator denies the application, he or she shall provide the applicant with a concise statement in writing of the reasons therefor. Within 30 days after receipt of a notice of denial, the applicant may appeal by written notice to the Administrator and may request either an informal hearing or a formal hearing to be held in accordance with the procedures set forth at 15 CFR Part 904, Subpart C.

(c) As soon as practicable after the close of a hearing or, in the case of a formal hearing, the issuance of a recommended decision by the Administrative Law Judge, the Administrator shall issue the final decision and serve notice thereof on the applicant. This decision shall be considered final agency action.

§ 960.11 Criteria for approval or denial.

Before approving an application and issuing a license or an amendment to a license, the Administrator shall find in writing that:

(a) The licensee will operate the system in a manner consistent with national security and the international obligations of the U.S.;

(b) The licensee will make available unenhanced data to all potential users on a nondiscriminatory basis in accordance with sections 104(3) and 601 of the Act.

(1) If the licensee or any affiliate or subsidiary will engage in any value-added activities, the plan required by section 402(b)(9)(B) of the Act must clearly identify all such value-added activities, whether conducted by the license itself or by any affiliate or subsidiary, and ensure that any unenhanced data generated by the system will be made available to all potential users on a nondiscriminatory basis;

(2) Where the value-added activity described in the plan required by section 402(b)(9) of the Act consists of processing data for general publication, the plan shall satisfy the requirements of this section if:

(i) Publication is timely;

(ii) The medium in which the imagery will be published will be available to any potential subscriber on a nondiscriminatory basis; and

(iii) All unenhanced data from which the imagery is derived will be available on a nondiscriminatory basis at the time of publication or within a reasonable time thereafter.

(c) The licensee will make available to the Administrator at the reasonable cost of reproduction and transmission all unenhanced data which the Administrator may request for a basic data set pursuant to section 602 of the Act; and

(d) If the space system will utilize a space platform owned or operated by the license, the licensee has agreed to dispose of such platform in a satisfactory manner.

In making the findings required by paragraph (a) of this section, the Administrator shall be entitled to rely upon the written recommendations of the Departments of Defense and State described in § 960.9(e).

§ 960.12 Contents of license.

Each license issued by the Administrator for the operation of a remote-sensing space system shall specify:

(a) The name and address of the person to whom the license is being issued, and the name and address of the agent for service of documents, if different;

(b) The effective date of the license and its duration;

(c) The characteristics of the system approved, including specifically:

(1) The range of orbits and altitudes authorized for operation;

(2) The range of spatial resolution or instantaneous field of view authorized; and

(3) The spectral bands authorized.

(d) Terms and conditions necessary to ensure:

(1) Compliance with any national security concerns and any international obligations specified by the Depart-

ments of Defense and State respectively.

(2) Adherence to the approved plans described in § 960.6(f) for the licensee to make unenhanced data available to all potential users on a nondiscriminatory basis;

(e) That the licensee will make available to the Administrator any data requested for a basic data set on reasonable terms and conditions;

(f) That the licensee will notify the Administrator of any agreement which it intends to enter into with any foreign nation or entity or any consortium involving a foreign nation or entity at least 30 days before concluding such an agreement;

(g) That the licensee will allow the Administrator or other appropriate federal officials access at any reasonable time to any facility or site of the licensee or any contractor of the licensee located within the jurisdiction or control of the United States:

(1) To verify that the space system conforms to representations made in the license application; or

(2) To monitor activities of the licensee under the license including the inspection of equipment, facilities and other records and ensure compliance with the terms of the license;

(h) That the licensee will surrender the license and terminate all operations immediately upon notification that the Administrator has determined under section 403(a)(1) of the Act that the licensee has substantially failed to comply with any of the requirements listed in section 403(a)(1);

(i) If the space system will utilize a civilian U.S. Government platform, that the licensee will reach an agreement with the appropriate agency to reimburse the Government for all related costs and to ensure that the use of the platform will not interfere with the government's mission;

(j) Appropriate provisions governing the disposition of any space platforms owned or operated by the licensee, including at a minimum sufficient advance notification to the Administrator of such disposition to allow review and approval of the procedures proposed;

(k) The conditions that require an amendment of the license including any change:

(1) In ownership of the licensee;

(2) In citizenship of: The president, proprietor, or other chief executive officer of the licensee and, if the licensee is a corporation, the chairman of the board of directors, or if the licensee is a partnership, a general partner;

(3) In the operations of the licensee that would result in sensing activities outside the range of orbits and altitudes, the range of spatial resolution or instantaneous field of vision, or the spectral bands approved under paragraph (c) of this section, except in case of an emergency posing an imminent and substantial threat of harm to human life, property, the environment or the remote-sensing space system itself, in which cases the licensee shall attempt to obtain oral approval from the Administrator;

(l) That the licensee will notify the Administrator of any value-added activities that will be conducted by the licensee or by a subsidiary or affiliate.

Subpart C—Enforcement Procedures

§ 960.13 General.

Section 403(a) of the act authorizes the Administrator to take actions adverse to a licensee if the licensee fails to comply with the Act, these regulations, or any terms, conditions, or restrictions in the license. These adverse actions are:

(a) License sanctions, including modification, suspension, and termination of any licensee;

(b) Civil penalties not to exceed $10,000 for each day of operation in violation of a license, regulation, or the Act; and

(c) Seizure of any object, record, or report if there is probable cause to believe that such object, record, or report is being or is likely to be used to commit a violation.

This subpart establishes uniform rules and procedures for these adverse actions.

§ 960.14 License sanctions.

(a) If the Administrator determines, on the basis of available information, that the licensee is not in compliance with any applicable provision of the Act, any regulation, or any license condition or restriction, the Administrator may issue the licensee a Notice of License Sanction (NOLS) proposing to:

(1) Terminate the license;

(2) Suspend the license for a specified period of time or until certain stated requirements are met, or both; or

(3) Modify the license, to aid future enforcement efforts.

(b) The NOLS will contain;

(1) A concise statement of the facts believed to show a violation;

(2) A specific reference to the provisions of the Act, regulation, or license allegedly violated;

(3) The nature and duration of the proposed sanction; and

(4) The effective date of the sanction, which is 30 days after the date of the NOLS unless the Administrator requires immediate termination of some or all licensed activities under paragraph (e) of this section or unless the licensee requests a hearing under paragraph (d) of this section.

(c) The NOLS also may propose to assess a civil penalty in accordance with § 960.15.

(d) Within 30 days after receipt of the NOLS, the licensee may request a hearing by serving a written request on the Administrator either in person or by certified or registered mail, return receipt requested, at the address specified in the NOLS. Such hearing shall be held in accordance with the procedures set forth at 15 CFR Part 904, Subpart C.

(e) If the Administrator determines that the licensee has substantially failed to comply with any provision of the Act, these regulations, or with any term, condition, or restriction of the license, the NOLS will include a finding to this effect and may require immediate termination of some or all licensed operations. For purposes of this section, "substantially fails to comply" means:

(1) Any failure to comply with a material term or condition of a license or of the Act or these regulations, which the Administrator has reasonable basis to believe is willful or intentional;

(2) Any failure to comply after notice by the Administrator;

(3) Any failure to comply with a material term or condition of a license which the Secretary of Defense determines clearly poses a threat to the national security or which the Secretary of State determines clearly poses a threat to international obligations of the United States.

(f) Any request for a hearing under paragraph (d) of this section will not delay immediate termination under this paragraph and the licensee is entitled to treat the finding as final agency action for purposes of judicial review.

§ 960.15 Civil penalties.

Section 403(a)(3) of the Act authorizes the Administrator to assess civil penalties of up to $10,000 for any violation of any requirement of the Act, these regulations or any term or condition of a license. Each day of operation in violation constitutes a separate violation. Such penalties will be assessed in accordance with the procedures set forth at 15 CFR Part 904, Subpart B.

§ 960.16 Seizure.

(a) If the Administrator determines that there is probable cause to believe that any object, record, or report was used, is being used or is likely to be used in violation of the Act, these regulations or the requirements of any license, the Administrator may seize any such item and issue the licensee a Notice of Seizure (NOS) containing:

(1) A description of the object, record, or report seized;

(2) A concise statement of the facts believed to show use or possible use in a violation; and

(3) A specific reference to the provisions of the Act, regulation, or license allegedly violated.

(b) Within 30 days after receipt of a NOS, the licensee may request a hearing by serving a written and dated request on the Administrator either in person or by certified or registered mail, return receipt requested, at the address specified in the notice. Such hearing shall be held in accordance with the procedures set forth at 15

CFR Part 904, Subpart C. For good cause shown, the Administrator may in his or her sole discretion return the seized item pending the outcome of the hearing.

PART 970—DEEP SEABED MINING REGULATIONS FOR EXPLORATION LICENSES

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AUTHORITY: 30 U.S.C. 1401 *et seq.*

Subpart A—General

SOURCE: 46 FR 45896, Sept. 15, 1981, unless otherwise noted.

§ 970.100 Purpose.

(a) *General.* The purpose of this part is to implement those responsibilities and authorities of the National Oceanic and Atmospheric Administration (NOAA), pursuant to Pub. L. 96-283, the Deep Seabed Hard Mineral Resources Act (the Act), to issue to eligible United States citizens licenses for the exploration for deep seabed hard minerals.

(b) *Purposes of the Act.* In preparing these regulations NOAA has been mindful of the purposes of the Act, as set forth in section 2(b) thereof. These include:

(1) Encouraging the successful conclusion of a comprehensive Law of the Sea Treaty, which will give legal definition to the principle that the hard mineral resources of the deep seabed are the common heritage of mankind and which will assure, among other things, nondiscriminatory access to such resources for all nations;

(2) Establishing, pending the ratification by, and entering into force with respect to, the United States of such a treaty, an interim program to regulate the exploration for and commercial recovery of hard mineral resources of the deep seabed by United States citizens;

(3) Accelerating the program of environmental assessment of exploration for and commercial recovery of hard mineral resources of the deep seabed and assuring that such exploration and recovery activities are conducted in a manner which will encourage the conservation of such resources, protect the quality of the environment, and promote the safety of life and property at sea;

(4) Encouraging the continued development of technology necessary to recover the hard mineral resources of the deep seabed; and

(5) Pending the ratification by, and entry into force with respect to, the United States of a Law of the Sea Treaty, providing for the establishment of an international revenue-sharing fund the proceeds of which will be used for sharing with the international community pursuant to such treaty.

(c) *Regulatory approach.* (1) These regulations incorporate NOAA's recognition that the deep seabed mining industry is still evolving and that more information must be developed to form the basis for future decisions by industry and by NOAA in its implementation of the Act. They also recognize the need for flexibility in order to promote the development of deep seabed mining technology, and the usefulness of allowing initiative by miners to develop mining techniques and systems in a manner compatible with the requirements of the Act and regulations. In this regard, the regulations reflect an approach, pursuant to the Act, whereby their provisions ultimately will be addressed and evaluated on the basis of exploration plans submitted by applicants.

(2) In addition, these regulations reflect NOAA's recognition that the difference in scale and effects between exploration for and commercial recovery of hard mineral resources normally requires that they be distinguished and addressed separately. This distinction is also based upon the evolutionary stage of the seabed mining industry referenced above. Thus, NOAA will issue separate regulations pertaining to commercial recovery, in Part 971 of this chapter.

[46 FR 45896, Sept. 15, 1981; 47 FR 5966, Feb. 9, 1982]

§ 970.101 Definitions.

For purposes of this part, the term:

(a) "Act" means the Deep Seabed Hard Mineral Resources Act (Pub. L. 96-283; 94 Stat. 553; 30 U.S.C. 1401 *et seq.*);

(b) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration, or a designee;

(c) "Applicant" means an applicant for an exploration license pursuant to the Act and this part;

(d) "Affiliate" means any person:

(1) In which the applicant or licensee owns or controls more than 5% interest;

(2) Which owns or controls more than 5% interest in the applicant or licensee; or

(3) Which is under common ownership or control with the applicant or licensee.

(e) "Commercial recovery" means:

(1) Any activity engaged in at sea to recover any hard mineral resource at a substantial rate for the primary purpose of marketing or commercially using such resource to earn a net profit, whether or not such net profit is actually earned;

(2) If such recovered hard mineral resource will be processed at sea, such processing; and

(3) If the waste of such activity to recover any hard mineral resource, or of such processing at sea, will be disposed of at sea, such disposal;

(f) "Continental Shelf" means:

(1) The seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of such submarine area; and

(2) The seabed and subsoil of similar submarine areas adjacent to the coast of islands;

(g) "Controlling interest", for purposes of paragraph (t)(3) of this section, means a direct or indirect legal or beneficial interest in or influence over another person arising through ownership of capital stock, interlocking directorates or officers, contractual relations, or other similar means, which substantially affect the independent business behavior of such person;

(h) "Deep seabed" means the seabed, and the subsoil thereof to a depth of ten meters, lying seaward of and outside:

(1) The Continental Shelf of any nation; and

(2) Any area of national resource jurisdiction of any foreign nation, if such area extends beyond the Continental Shelf of such nation and such jurisdiction is recognized by the United States;

(i) "Exploration" means:

(1) Any at-sea observation and evaluation activity which has, as its objective, the establishment and documentation of:

(i) The nature, shape, concentration, location, and tenor of a hard mineral resource; and

(ii) The environmental, technical, and other appropriate factors which must be taken into account to achieve commercial recovery; and

(2) The taking from the deep seabed of such quantities of any hard mineral resource as are necessary for the design, fabrication and testing of equipment which is intended to be used in the commercial recovery and processing of such resource;

(j) "Hard mineral resource" means any deposit or accretion on, or just below, the surface of the deep seabed of nodules which include one or more minerals, at least one of which contains manganese, nickel, cobalt, or copper;

(k) "International agreement" means a comprehensive agreement concluded through negotiations at the Third United Nations Conference on the Law of the Sea, relating to (among other matters) the exploration for and commercial recovery of hard mineral resources and the establishment of an international regime for the regulation thereof;

(l) "Licensee" means the holder of a license issued under this part to engage in exploration;

(m) "New entrant" means any applicant, with respect to:

(1) Any application which has not been accorded a pre-enactment explorer priority of right under § 970.301; or

(2) Any amendment which has not been accorded a pre-enactment explorer priority of right under § 970.302.

(n) "NOAA" means the National Oceanic and Atmospheric Administration;

(o) "Permittee" means the holder of permit issued under NOAA regulations to engage in commercial recovery;

(p) "Person" means any United States citizen, any individual, and any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any nation;

(q) "Pre-enactment explorer" means a person who was engaged in exploration prior to the date of enactment of the Act (June 28, 1980);

(r) "Reciprocating state" means any foreign nation designated as such by the Administrator under section 118 of the Act;

(s) "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the United States Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States; and

(t) "United States citizen" means

(1) Any individual who is a citizen of the United States;

(2) Any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any of the United States; and

(3) Any corporation, partnership, joint venture, association, or other entity (whether organized or existing under the laws of any of the United States or a foreign nation) if the controlling interest in such entity is held by an individual or entity described in paragraph (t)(1) or (t)(2) of this section.

[46 FR 45896, Sept. 15, 1981, as amended at 47 FR 5967, Feb. 9, 1982]

§ 970.102 Nature of licenses.

(a) A license issued under this part will authorize the holder thereof to engage in exploration within a specific portion of the sea floor consistent with the provisions of the Act, this part, and the specific terms, conditions and restrictions applied to the license by the Administrator.

(b) Any license issued under this part will be exclusive with respect to the holder thereof as against any other United States citizen or any citizen, national or governmental agency of, or any legal entity organized or existing under the laws of, any reciprocating state.

(c) A valid existing license will entitle the holder, if otherwise eligible under the provisions of the Act and implementing regulations, to a permit for commercial recovery from an area selected within the same area of the sea floor. Such a permit will recognize the right of the holder to recover hard mineral resources, and to own, transport, use, and sell hard mineral resources recovered, under the permit and in accordance with the requirements of the Act.

§ 970.103 Prohibited activities and restrictions.

(a) *Prohibited activities and exceptions.* (1) Except as authorized under Subpart C of this part, no United States citizen may engage in any exploration or commercial recovery unless authorized to do so under:

(i) A license or a permit issued pursuant to the Act and implementing regulations;

(ii) A license, permit, or equivalent authorization issued by a reciprocating state; or

(iii) An international agreement which is in force with respect to the United States.

(2) The prohibitions of paragraph (a)(1) of this section will not apply to any of the following activities:

(i) Scientific research, including that concerning hard mineral resources;

(ii) Mapping, or the taking of any geophysical, geochemical, oceanographic, or atmospheric measurements or random bottom samplings of the deep seabed, if such taking does not significantly alter the surface or subsurface of the deep seabed or significantly affect the environment;

(iii) The design, construction, or testing of equipment and facilities which will or may be used for exploration or commercial recovery, if such design, construction or testing is conducted on shore, or does not involve the recovery of any but incidental hard mineral resources;

(iv) The furnishing of machinery, products, supplies, services, or materials for any exploration or commercial recovery conducted under a license or permit issued under the Act and implementing regulations, a license or permit or equivalent authorization issued by a reciprocating state, or under an international agreement; and

(v) Activities, other than exploration or commercial recovery activities, of the Federal Government.

(3) No United States citizen may interfere or participate in interference with any activity conducted by any licensee or permittee which is authorized to be undertaken under a license or permit issued by the Administrator to a licensee or permittee under the Act or with any activity conducted by the holder of, and authorized to be undertaken under, a license or permit or equivalent authorization issued by a reciprocating state for the exploration or commercial recovery of hard mineral resources. For purposes of this section, interference includes physical interference with activities authorized by the Act, this part, and a license issued pursuant thereto; the filing of specious claims in the United States or any other nation; and any other activity designed to harass deep seabed mining activities authorized by law. Interference does not include the exercise of any rights granted to United States citizens by the Constitution of the United States, any Federal or State law, treaty, or agreement or regulation promulgated pursuant thereto.

(4) United States citizens must exercise their rights on the high seas with reasonable regard for the interests of other states in their exercise of the freedoms of the high seas.

(b) *Restrictions on issuance of licenses or permits.* The Administrator will not issue:

(1) Any license or permit after the date on which an international agreement is ratified by and enters into force with respect to the United States, except to the extent that issuance of such license or permit is not inconsistent with such agreement;

(2) Any license or permit the exploration plan or recovery plan of which, submitted pursuant to the Act and implementing regulations, would apply to an area to which applies, or would conflict with:

(i) Any exploration plan or recovery plan submitted with any pending application to which priority of right for issuance applies under this part;

(ii) Any exploration plan or recovery plan associated with any existing license or permit; or

(iii) Any equivalent authorization which has been issued, or for which formal notice of application has been submitted, by a reciprocating state prior to the filing date of any relevant application for licenses or permits pursuant to the Act and implementing regulations;

(3) A permit authorizing commercial recovery within any area of the deep seabed in which exploration is authorized under a valid existing license if such permit is issued to a person other than the licensee for such area;

(4) Any exploration license before July 1, 1981, or any permit which authorizes commercial recovery to commence before January 1, 1988;

(5) Any license or permit the exploration plan or recovery plan for which applies to any area of the deep seabed if, within the 3-year period before the date of application for such license or permit:

(i) The applicant therefor surrendered or relinquished such area under an exploration plan or recovery plan associated with a previous license or permit issued to such applicant; or

(ii) A license or permit previously issued to the applicant had an exploration plan or recovery plan which applied to such area and such license or permit was revoked under section 106 of the Act; or

(6) A license or permit, or approve the transfer of a license or permit, except to a United States citizen.

Subpart B—Applications

Source: 46 FR 45898, Sept. 15, 1981, unless otherwise noted.

§ 970.200 General.

(a) *Who may apply; how.* Any United States citizen may apply to the Administrator for issuance or transfer of an exploration license. Applications must be submitted in the form and manner prescribed in this subpart.

(b) *Place, form and copies.* Applications for the issuance or transfer of exploration licenses must be submitted in writing, verified and signed by an authorized officer or other authorized representative of the applicant, in 30 copies, to the following address: Office of Ocean Minerals and Energy, National Oceanic and Atmospheric Administration, Suite 410, Page 1 Building, 2001 Wisconsin Avenue, NW., Washington, DC 20235. The Administrator may waive, in whole or in part, at his discretion, the requirement that 30 copies of an application be filed with NOAA.

(c) *Use of application information.* The contents of an application, as set forth below, must provide NOAA with the information necessary to make determinations required by the Act and this part pertaining to the issuance or transfer of an exploration license. Thus, each portion of the application should identify the requirement in this part to which it responds. In addition, the information will be used by NOAA in its function under the Act of consultation and cooperation with other Federal agencies or departments in relation to their programs and authorities, in order to reduce the number of separate actions required to satisfy Federal agencies' responsibilities.

(d) *Pre-application consultation.* To assist in the development of adequate applications and assure that applicants understand how to respond to the provisions of this subpart, NOAA will be available for pre-application consultations with potential applicants. This includes consultation on the procedures in Subpart C. In appropriate circumstances, NOAA will provide written confirmation to the applicant of any oral guidance resulting from such consultations.

(e) *Priority of right.* (1) Priority of right for issuance of licenses to pre-enactment explorers will be established pursuant to Subpart C of this part.

(2) Priority of right for issuance of licenses to new entrants will be established on the basis of the chronological order in which license applications, which are in substantial compliance with the requirements established under this subpart, pursuant to § 970.209, are filed with the Administrator.

(3) Applications must be received by the Office of Ocean Minerals and Energy on behalf of the Administrator before a priority can be established.

(4) Upon (i) a determination that:

(A) An application is not in substantial compliance in accordance with § 970.209 or Subpart C, as applicable;

(B) An application has not been brought into substantial compliance in accordance with § 970.210 or Subpart C, as applicable;

(C) A license has been relinquished or surrendered in accordance with § 970.903; or

(ii) A decision to:

(A) Deny certification of a license pursuant to § 970.407; or

(B) Deny issuance of a license pursuant to § 970.508,

and after the exhaustion of any administrative or judicial review of such determination or decision, the priority of right for issuance of a license will lapse.

(f) *Request for confidential treatment of information.* If an applicant wishes to have any information in his application treated as confidential, he must so indicate pursuant to 15 CFR 971.802.

[46 FR 45898, Sept. 15, 1981, as amended at 47 FR 5968, Feb. 9, 1982; 54 FR 547, Jan. 6, 1989]

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§ 970.201 Statement of financial resources.

(a) *General.* The application must contain information sufficient to demonstrate to the Administrator the financial resources of the applicant to carry out, in accordance with this part, the exploration program set forth in the applicant's exploration plan. The information must show that the applicant is reasonably capable of committing or raising sufficient resources to cover the estimated costs of the exploration program. The information must be sufficient for the Administrator to make a determination on the applicant's financial responsibility pursuant to § 970.401.

(b) *Contents.* In particular, the information on financial resources must include:

(1) A description of how the applicant intends to finance the exploration program;

(2) The estimated cost of the exploration program;

(3) With respect to the applicant and those entities upon which the applicant will rely to finance his exploration activities, the most recent audited financial statement (for publicly-held companies, the most recent annual report and Form 10-K filed with the Securities and Exchange Commission will suffice in this regard); and

(4) The credit rating and bond rating of the applicant, and such financing entities, to the extent they are relevant.

§ 970.202 Statement of technological experience and capabilities.

(a) *General.* The application must contain information sufficient to demonstrate to the Administrator the technological capability of the applicant to carry out, in accordance with the regulations contained in this part, the exploration program set out in the applicant's exploration plan. It must contain sufficient information for the Administrator to make a determination on the applicant's technological capability pursuant to § 970.402.

(b) *Contents.* In particular, the information submitted pursuant to this section must demonstrate knowledge and skills which the applicant either possesses or to which he can demonstrate access. The information must include:

(1) A description of the exploration equipment to be used by the applicant in carrying out the exploration program;

(2) A description of the environmental monitoring equipment to be used by the applicant in monitoring the environmental effects of the exploration program; and

(3) The experience on which the applicant will rely in using this or similar equipment.

§ 970.203 Exploration plan.

(a) *General.* Each application must include an exploration plan which describes the applicant's projected exploration activities during the period to be covered by the proposed license. Generally, the exploration plan must demonstrate to a reasonable extent that the applicant's efforts, by the end of the 10-year license period, will likely lead to the ability to apply for and obtain a permit for commercial recovery. In particular, the plan must include sufficient information for the Administrator, pursuant to this part, to make the necessary determinations pertaining to the certification and issuance or transfer of a license and to the development and enforcement of the terms, conditions and restrictions for a license.

(b) *Contents.* The exploration plan must contain the following information. In presenting this information, the plan should incorporate the applicant's proposed individual approach, including a general description of how projected participation by other entities will relate to the following elements, if appropriate. The plan must present:

(1) The activities proposed to be carried out during the period of the license;

(2) A description of the area to be explored, including its delineation according to § 970.601;

(3) The intended exploration schedule which must be responsive to the diligence requirements in § 970.602. Taking into account that different applicants may have different concepts

and chronologies with respect to the types of activities described, the schedule should include an approximate projection for the exploration activities planned. Although the details in each schedule may vary to reflect the applicant's particular approach, it should address in some respect approximately when each of the following types of activities is projected to occur.

(i) Conducting survey cruises to determine the location and abundance of nodules as well as the sea floor configuration, ocean currents and other physical characteristics of potential commercial recovery sites;

(ii) Assaying nodules to determine their metal contents;

(iii) Designing and testing system components onshore and at sea;

(iv) Designing and testing mining systems which simulate commercial recovery;

(v) Designing and testing processing systems to prove concepts and designing and testing systems which simulate commercial processing;

(vi) Evaluating the continued feasibility of commercial scale operations based on technical, economic, legal, political and environmental considerations; and

(vii) Applying for a commercial recovery permit and, to the extent known, other permits needed to construct and operate commercial scale facilities (if application for such permits is planned prior to obtaining a commercial recovery permit);

(4) A description of the methods to be used to determine the location, abundance, and quality (i.e., assay) of nodules, and to measure physical conditions in the area which will affect nodule recovery system design and operations (e.g., seafloor topography, seafloor geotechnic properties, and currents);

(5) A general description of the developing recovery and processing technology related to the proposed license, and of any planned or ongoing testing and evaluation of such technology. To the extent possible at the time of application, this description should address such factors as nodule collection technique, seafloor sediment rejection subsystem, mineship nodule separation scheme, pumping method, anticipated equipment test areas, and details on the testing plan;

(6) An estimated schedule of expenditures, which must be responsive to the diligence requirements as discussed in § 970.602;

(7) Measures to protect the environment and to monitor the effectiveness of environmental safeguards and monitoring systems for commercial recovery. These measures must take into account the provisions in §§ 970.506, 970.518, 970.522 and Subpart G of this part; and

(8) A description of any relevant activity that the applicant has completed prior to the submission of the application.

§ 970.204 Environmental and use conflict analysis.

(a) *Environmental information.* To enable NOAA to implement better its responsibility under section 109(d) of the Act to develop an environmental impact statement (EIS) on the issuance of an exploration license, the application must include information for use in preparing NOAA's EIS on the environmental impacts of the activities proposed by the applicant. The applicant must present physical, chemical and biological information for the exploration area. This information should include relevant environmental information, if any, obtained during past exploration activities, but need not duplicate information obtained during NOAA's DOMES Project. Planned activities in the area, including the testing of integrated mining systems which simulate commercial recovery, also must be described. NOAA will need information with the application on location and boundaries of the proposed exploration area, and plans for delineation of features of the exploration area including baseline data or plans for acquiring them. The applicant may at his option delay submission of baseline and equipment data and system test plans. However, applicants so electing should plan to submit this latter information at least one year prior to the initial test, to allow time for the supplement to the site-specific EIS, if one s required, to be prepared by NOAA, circulated, reviewed and filed with EPA. The submission of this information with the application is strongly encouraged, however, to minimize the possibility that a supplement will be required. If such latter information is submitted subsequent to the original application such tests may not be undertaken in the absence of concurrence by NOAA (which, if applicable, will be required in a term, condition, or restriction in the license). NOAA has developed a technical guidance document which will provide assistance for the agency and the applicant, in consultation, to identify the details on information needed in each case. NOAA may refer to such information for purposes of other determinations under the Act as well. NOAA also will seek to facilitate other Federal and, as necessary, state decisions on exploration activities by functioning as lead agency for the EIS on the application and related actions by other agencies, including those pertaining to any onshore impacts which may result from the proposed exploration activities.

(b) *Use conflict information.* To assist the Administrator in making determinations relating to potential use conflicts between the proposed exploration and other activities in the exploration area, pursuant to §§ 970.503, 970.505, and 970.520, the application must include information known to the applicant with respect to such other activities.

§ 970.205 Vessel safety.

In order to provide a basis for the necessary determinations with respect to the safety of life and property at sea, pursuant to §§ 970.507, 970.521 and Subpart H of this part, the application must contain the following information, except for those vessels under 300 gross tons which are engaged in oceanographic research if they are used in exploration.

(a) *U.S. flag vessel.* The application must contain a demonstration or affirmation that any United States flag vessel utilized in exploration activities will possess a current valid Coast Guard Certificate of Inspection (COI). To the extent that the applicant knows which United States flag vessel he will be using, the application must include a copy of the COI.

(b) *Foreign flag vessel.* The application must also contain information on any foreign flag vessels to be used in exploration activities, which responds to the following requirements. To the extent that the applicant knows which foreign flag vessel he will be using, the application must include evidence of the following:

(1) That any foreign flag vessel whose flag state is party to the International Convention for Safety of Life at Sea, 1974 (SOLAS 74) possesses current valid SOLAS 74 certificates;

(2) That any foreign flag vessel whose flag state is not party to SOLAS 74 but is party to the International Convention for the Safety of Life at Sea, 1960 (SOLAS 60) possesses current valid SOLAS 60 certificates; and

(3) That any foreign flag vessel whose flag state is not a party to either SOLAS 74 or SOLAS 60 meets all applicable structural and safety requirements contained in the published rules of a member of the International Association of Classification Societies (IACS).

(c) *Supplemental certificates.* If the applicant does not know at the time of submitting an application which vessels he will be using, he must submit the applicable certification for each vessel before the cruise on which it will be used.

§ 970.206 Statement of ownership.

The application must include sufficient information to demonstrate that the applicant is a United States citizen, as required by § 970.103(b)(6), and as defined in § 970.101(t). In particular, the application must include:

(a) Name, address, and telephone number of the United States citizen responsible for exploration operations to whom notices and orders are to be delivered; and

(b) A description of the citizen or citizens engaging in such exploration, including:

(1) Whether the citizen is a natural person, partnership, corporation, joint venture, or other form of association;

(2) The state of incorporation or state in which the partnership or other business entity is registered;

(3) The name of registered agent or equivalent representative and places of business;

(4) Certification of essential and nonproprietary provisions in articles of incorporation, charter or articles of association; and

(5) The name of each member of the association, partnership, or joint venture, including information about the participation of each partner and joint venturer and/or ownership of stock.

§ 970.207 Antitrust information.

(a) *General.* Section 103(d) of the Act specifically provides for antitrust review of applications by the Attorney General of the United States and the Federal Trade Commission.

(b) *Contents.* In order to provide information for this antitrust review, the application must contain the following:

(1) A copy of each agreement between any parties to any joint venture which is applying for a license, provided that said agreement relates to deep seabed hard mineral resource exploration or mining;

(2) The identity of any affiliate of any person applying for a license; and

(3) For each applicant, its affiliate, or parent or subsidiary of an affiliate which is engaged in production in, or the purchase or sale in or to, the United States of copper, nickel, cobalt or manganese minerals or any metals refined from these minerals:

(i) The annual tons and dollar value of any of these minerals and metals so purchased, sold or produced for the two preceding years;

(ii) Copies of the annual report, balance sheet and income statement for the two preceding years; and

(iii) Copies of each document submitted to the Securities and Exchange Commission.

§ 970.208 Fee.

(a) *General.* Section 104 of the Act provides that no application for the issuance or transfer of an exploration license will be certified unless the applicant pays to NOAA a reasonable administrative fee, which must reflect the reasonable administrative costs incurred in reviewing and processing the application.

(b) *Amount.* In order to meet this requirement, the application must include a fee payment of $100,000, payable to the National Oceanic and Atmospheric Administration, Department of Commerce. If costs incurred by NOAA in reviewing and processing an application are significantly less than or in excess of the original fee, the agency subsequently will determine those differences in costs and adjust the fee accordingly. If the costs are significantly less, NOAA will refund the difference. If they are significantly greater, the applicant will be required to submit the additional payment prior to issue or transfer of the license. In the case of an application for transfer of a license to an entity which has previously been found qualified for a license, the Administrator may, on the basis of pre-application consultations pursuant to § 970.200(d), reduce the fee in advance by an appropriate amount which reflects costs avoided by reliance on previous findings made in relation to the proposed transferee. If an applicant elects to pursue the 'banking' option under § 970.601(d), and exercises that option by submitting two applications, only one application fee needs to be submitted with respect to each use of the 'banking' option.

[46 FR 45898, Sept. 15, 1981, as amended at 47 FR 5966, 5968, Feb. 9, 1982]

PROCEDURES

§ 970.209 Substantial compliance with application requirements.

(a) Priority of right for the issuance of licenses to new entrants will be established on the basis of the chronological order in which license applications which are in substantial compliance with the requirements established under this subpart are filed with the Administrator pursuant to § 970.200.

(b) In order for an application to be in substantial compliance with the requirements of this subpart, it must include information specifically identifiable with and materially responsive to each requirement contained in §§ 970.201 through 970.208. A determination on substantial compliance relates only to whether the application contains the required information, and does not constitute a determination on certification of the application, or on issuance or transfer of a license.

(c) The Administrator will make a determination as to whether the application is in substantial compliance. Within 30 days after receipt of an application and the opening of coordinates describing the application area, he will issue written notice to the applicant regarding such determination. The notice will identify, if applicable, in what respects the application is not in either full or substantial compliance. If the application is in substantial but not full compliance, the notice will specify the information which the applicant must submit in order to bring it into full compliance, and why the additional information is necessary.

[46 FR 45898, Sept. 15, 1981, as amended at 47 FR 11513, Mar. 17, 1982]

§ 970.210 Reasonable time for full compliance.

Priority of right will not be lost in case of any application filed which is in substantial but not full compliance, as specified in § 970.209, if the Administrator determines that the applicant, within 60 days after issuance to the applicant by the Administrator of written notice that the application is in substantial but not full compliance, has brought the application into full compliance with the requirements of §§ 970.201 through 970.208.

[46 FR 45898, Sept. 15, 1981; 47 FR 5966, Feb. 9, 1982]

§ 970.211 Consultation and cooperation with Federal agencies.

(a) Promptly after his receipt of an application and the opening of coordinates describing the application area, the Administrator will distribute a copy of the application to each other Federal agency or department which, pursuant to section 103(e) of the Act, has identified programs or activities within its statutory responsibilities which would be affected by the activities proposed in the application (i.e., the Departments of State, Transportation, Justice, Interior, Defense, Treasury and Labor, as well as the Environmental Protection Agency, Federal Trade Commission, Small Business Administration and National Science Foundation). Based on its legal responsibilities and authorities, each such agency or department may, not later than 60 days after it receives a copy of the application which is in full compliance with this subpart, recommend certification of the application, issuance or transfer of the license, or denial of such certification, issuance or transfer. The advice or recommendation by the Attorney General or Federal Trade Commission on antitrust review, pursuant to § 970.207, must be submitted within 90 days after their receipt of a copy of the application which is in full compliance with this subpart. NOAA will use the benefits of this process of consultation and cooperation to facilitate necessary Federal decisions on the proposed exploration activities, pursuant to the mandate of section 103(e) of the Act to reduce the number of separate actions required to satisfy Federal agencies' statutory responsibilities.

(b) In any case in which a Federal agency or department recommends a denial, it will set forth in detail the manner in which the application does not comply with any law or regulation within its area of responsibility and will indicate how the application may be amended, or how terms, conditions or restrictions might be added to the license to assure compliance with such law or regulation.

(c) A recommendation from another Federal agency or department for denying or amending an application will not affect its having been in substantial compliance with the requirements of this subpart, pursuant to § 970.209, for purposes of establishing priority of right. However, pursuant to section 103(e) of the Act, NOAA will cooperate with such agencies and with the applicant with the goal of resolving the concerns raised and satisfying the statutory responsibilities of these agencies.

[46 FR 45898, Sept. 15, 1981, as amended at 47 FR 11513, Mar. 17, 1982]

§ 970.212 Public notice, hearing and comment.

(a) *Notice and comments.* The Administrator will publish in the FEDERAL REGISTER, for each application for an exploration license, notice that such application has been received. Subject to 15 CFR 971.802, interested persons will be permitted to examine the materials relevant to such application. Interested persons will have at least 60 days after publication of such notice to submit written comments to the Administrator.

(b) *Hearings.* (1) After preparation of the draft EIS on an application pursuant to section 109(d) of the Act, the Administrator shall hold a public hearing on the application and the draft EIS in an appropriate location, and may employ such additional methods as he deems appropriate to inform interested persons about each application and to invite their comments thereon.

(2) If the Administrator determines there exists one or more specific and material factual issues which require resolution by formal processes, at least one formal hearing will be held in the District of Columbia metropolitan area in accordance with the provisions of Subpart I of 15 CFR Part 971. The record developed in any such formal hearing will be part of the basis of the Administrator's decisions on an application.

(c) Hearings held pursuant to this section and other procedures will be consolidated insofar as practicable with hearings held and procedures employed by other agencies.

[46 FR 45898, Sept. 15, 1981, as amended at 54 FR 547, Jan. 6, 1989]

§ 970.213 Amendment to an application.

After an application has been submitted to the Administrator, but before a determination is made on the issuance or transfer of a license, the applicant must submit an amendment to the application if required by a significant change in the circumstances represented in the original application and affecting the requirements of this subpart. Applicants should consult with NOAA to determine if changes in circumstances are sufficiently significant to require submission of an amendment. The application, as amended, would then serve as the basis for determinations by the Administrator under this part. For each amendment judged by the Administrator to be significant, he will provide a copy of such amendment to each other Federal agency and department which received a copy of the original application, and also will provide for public notice, hearing and comment on the amendment pursuant to § 970.212. Such amendment, however, will not affect the priority of right established by the filing of the original application. After the issuance of or transfer of a license, any revision by the licensee will be made pursuant to § 970.512.

Subpart C—Procedures for Applications Based on Exploration Commenced Before June 28, 1980; Resolution of Conflicts Among Overlapping Applications; Applications by New Entrants

SOURCE: 47 FR 24948, July 8, 1982, unless otherwise noted.

§ 970.300 Purposes and definitions.

(a) This subpart sets forth the procedures which the Administrator will apply to applications filed with NOAA covering areas of the deep seabed where the applicants have engaged in exploration prior to June 28, 1980, and to the resolution of conflicts arising out of such applications. This subpart also establishes the date on which NOAA will begin to accept applications or amendments filed by new entrants, and certain other procedures for new entrants.

(b) For the purposes of this subpart the term:

(1) "Amendment" means an amendment to an application which changes the area applied for;

(2) "Application" means an application for an exploration license which is filed pursuant to the Act and this subpart;

(3) "Conflict" means the existence of more than one application or

amendment with the same priority of right:

(i) Which are filed with the Administrator or with the Administrator and a reciprocating state; and

(ii) In which the deep seabed areas applied for overlap in whole or part, to the extent of the overlap;

(4) "Original conflict" means a conflict solely between or among applications;

(5) "New conflict" means a conflict between or among amendments filed after July 22, 1982, and on or before October 15, 1982;

(6) "Domestic conflict" means a conflict solely between or among applications or amendments which have been filed with the Administrator.

(7) "International conflict" means a conflict arising between or among applications or amendments filed with the Administrator and a reciprocating state.

§ 970.301 Requirements for applications based on pre-enactment exploration.

(a) Pursuant to section 101(b) of the Act, any United States citizen who was engaged in exploration before the effective date of the Act (June 28, 1980) qualifies as a pre-enactment explorer and may continue to engage in such exploration without a license:

(1) If such citizen applies under this part for a license with respect to such exploration within the time period specified in paragraph (b) of this section; and

(2) Until such license is issued to such citizen or a final administrative or judicial determination is made affirming the denial of certification of the application for, or issuance of, such license.

(b) Any application for a license based upon pre-enactment exploration must be filed, at the address specified in § 970.200(b), no later than 5:00 p.m. EST on March 12, 1982 (or such later date and time as the Administrator may announce by regulation). All such applications filed at or before that time will be deemed to be filed on such closing date.

(c) Applications not filed in accordance with this section will not be considered to be based on pre-enactment exploration, and may be filed only as new entrant applications under § 970.303.

(d) To receive a pre-enactment explore priority of right for issuance of a license, and application must be, when filed, in substantial compliance with requirements described in § 970.209(b). An application which is in substantial but not full compliance will not lose its priority of right if it is brought into full compliance according to § 970.210.

(e) Any application based on pre-enactment exploration must be for a reasonably compact area with respect to which the applicant is a pre-enactment explorer, and, notwithstanding any part of § 970.601 which indicates otherwise, such area must be bounded by a single continuous boundary.

(f) The coordinates and any chart of the logical mining unit applied for in an application based on a pre-enactment exploration must be submitted in a separate, sealed envelope.

(g) On or before March 12, 1982, the applicants must indicate to the Administrator, other than in the sealed portion of the application: (1) The size of the area applied for; (2) Whether the applicant or any person on the applicant's behalf has applied, or intends to apply, for the same area or substantially the same area to one or more nations, and the number of such other applications; and (3) Whether the other applicant is pursuing the "banking" option under § 970.601(d), and the number of applications filed, or to be filed, in pursuit of the "banking" option.

§ 970.302 Procedures and criteria for resolving conflicts.

(a) *General.* This section governs the resolution of all conflicts between or among applications or amendments having pre-enactment explorer priority of right.

(b) *Identification of applicants.* On June 21, 1982, the Administrator will meet with representatives of reciprocating states to identify their respective pre-enactment explorer applicants, and will identify the coordinates of the application areas applied for by such applicants.

(c) *Initial processing.* On or before July 13, 1982, the Administrator will determine whether each domestic application is entitled to a priority of right based on pre-enactment exploration in accordance with § 970.301.

(d) *Identification of conflicts.* On July 14, 1982, the Administrator will meet with representatives of reciprocating states to exchange lists of applications accorded pre-enactment explorer priorities of right, and will identify any conflicts existing among such applications.

(e) *Notification to applicants of conflicts.* If the Administrator identifies a conflict, he will send, no later than July 22, 1982, written notice of the conflict to each domestic applicant involved in the conflict. The notice will:

(1) Identify each applicant involved in the conflict in question:

(2) Identify the coordinates of the portions of the application areas which are in conflict;

(3) Indicate that the applicant may request from the Administrator the coordinates of the application areas from any other applications filed with the Administrator or with a reciprocating state (such coordinates will be provided subject to appropriate confidentiality arrangements);

(4) State whether;

(i) Each domestic application involved in the conflict is in substantial or, if known, full compliance with the requirements described in § 970.209(b); and

(ii) Each foreign application involved in the conflict meets, if known, the legal requirements of the reciprocating state in which it is filed;

(5) Notify each domestic applicant involved in a conflict that he may, after July 22, 1982, and on or before November 16, 1982, resolve the conflict voluntarily according to paragraph (f) of this section, and that on or after November 17, 1982, any unresolved conflict shall be resolved in accordance with paragraph (j) or (k) of this section, as applicable; and

(6) In the case of an international conflict, include a copy of any applicable conflict resolution procedures in force between the United States and its reciprocating states pursuant to section 118 of the Act.

(f) *Voluntary resolution of conflicts.* Each U.S. applicant involved in a conflict may resolve the conflict after July 22, 1982, and on or before November 16, 1982, by:

(1) Unilaterally, or by agreement with each other applicant involved in the conflict, filing an amendment to the application eliminating the conflict; or

(2) Agreeing in writing with the other applicant(s) involved in the conflict to submit it to an agreed binding conflict resolution procedure.

(g) *Amendments.* (1) Amendments must be filed in accordance with the requirements for applications described in § 970.200.

(2) The Administrator will:

(i) Accept no amendment prior to July 23, 1982;

(ii) Accord pre-enactment explorer priority of right only to amendments which:

(A) Pertain to areas with respect to which the applicant has engaged in pre-enactment exploration;

(B) Resolve an existing conflict with respect to that application;

(C) Do not apply for an area included in an application filed pursuant to § 970.301 which is accorded pre-enactment explorer priority of right or an application identified pursuant to § 970.302(b) which has been filed with a reciprocating state; and

(D) Are filed on or before October 15, 1982; and

(iii) Accord amendments which meet the requirements of this paragraph (g) the same priority of right as the applications to which they pertain.

(3) The area applied for in an amendment need not be adjacent to the area applied for in the original application.

(4) Amendments not accorded pre-enactment explorer priority of right may be filed as new entrant amendments under § 970.303.

(h) *Notification of amendments and new conflicts.* The Administrator will:

(1) No later than October 25, 1982, notify each reciprocating state of any amendment accorded pre-enactment explorer priority of right pursuant to paragraph (g) of this section and, in cooperation with such states, identify any new conflicts;

(2) No later than October 27, 1982, notify each domestic applicant who is

volved in a new conflict. The notice ll:

(i) Identify each applicant with hom each new conflict has arisen;

(ii) Identify the coordinates of each ea in which the applicant is involved a new conflict;

(iii) Indicate that the applicant may quest from the Administrator the oordinates of each area included in amendment accorded pre-enact- ent explorer priority of right pursu- nt to paragraph (g) of this section, or r which notice has been received om a reciprocating state (such co- rdinates will be provided subject to ppropriate confidentiality arrange- ents);

(iv) Notify the applicant that he ay, on or before November 16, 1982, esolve the conflict voluntarily accord- g to paragraph (f) of this section, nd that on or after November 17, 982, any unresolved conflict shall be esolved in accordance with paragraph) or (k) of this section, as applicable; nd

(v) In the case of an international onflict, include a copy of any applica- le conflict resolution procedures in orce between the United States and s reciprocating states pursuant to ection 118 of the Act.

(i) *Government assistance in resolv- ng international conflicts.* If, by Oc- ober 26 1982, the applicants have not esolved, or agreed in writing to a pecified binding procedure to resolve, n original international conflict, or ew international conflict, the Admin- strator, the Secretary of State of the nited States, and appropriate offi- ials of the government of the recipro- ating state to which the other appli- ant involved in the conflict applied vill use their good offices to assist the pplicants to resolve the conflict. After November 16, 1982, any unre- olved international conflicts will be esolved in accordance with paragraph k) of this section.

(j) *Unresolved domestic conflict*—(1) *Procedure.* (i) In the case of an origi- al domestic conflict or a new domes- ic conflict, the applicants will be al- owed until April 15, 1983, to resolve he conflict or agree in writing to ubmit the conflict to a specified bind- ng conflict resolution procedure. If, by April 15, 1983, all applicants involved in an original or new domestic conflict have not resolved that conflict, or agreed in writing to submit the conflict to a specified binding conflict resolution procedure, the conflict will be resolved in a formal hearing held in accordance with Subpart I of 15 CFR Part 971, except that:

(A) The General Counsel of NOAA will not, as a matter of right, be a party to the hearing; however, the General Counsel may be admitted to the hearing by the administrative law judge as a party or as an interested person pursuant to 15 CFR 971.901 (f)(2) or (f)(3); and

(B) The administrative law judge will take such actions as he deems necessary and appropriate to conclude the hearing and transmit a recommended decision to the Administrator in an expeditious manner.

(ii) Notwithstanding the above, at any time on or after November 17, 1982, and on or before April 14, 1983, the applicants involved in the conflict may, by agreement, request the Administrator to resolve the conflict in a formal hearing as described above.

(2) *Decision principles for NOAA formal conflict resolution.* (i) The Administrator shall determine which applicant involved in a conflict between or among pre-enactment explorer applications or amendments shall be awarded all or part of each area in conflict.

(ii) The determination of the Administrator shall be based on the application of principles of equity which take into consideration, with respect to each applicant involved in the conflict, the following factors:

(A) The continuity and extent of activities relevant to each area in conflict and the application area of which it is a part;

(B) The date on which each applicant involved in the conflict, or predecessor in interest or component organization thereof, commenced activities at sea in the application area;

(C) The financial cost of activities relevant to each area in conflict and to the application area of which it is a part, measured in constant dollars;

(D) The time when the activities were carried out, and the quality of the activities; and

(E) Such additional factors as the Administrator determines to be relevant, but excluding consideration of the future work plans of the applicants involved in any conflict.

(iii) For the purposes of this paragraph (j) of this section, the word "activities" means the undertakings, commitments of resources investigations, findings, research, engineering development and other activities relevant to the identification, discovery, and systematic analysis and evaluation of hard mineral resources and to the determination of the technical and economic feasibility of commercial recovery.

(iv) When considering the factors specified in paragraph (j)(2)(ii) of this section, the Administrator shall hear, and shall (except for purposes of apportionment pursuant to paragraph (j)(2)(v) of this section) limit his consideration to, all evidence based on the activities specified in paragraph (j)(2)(ii) of this section which were conducted on or before January 1, 1982, *Provided, however,* That an applicant must prove at-sea activities in the area in conflict prior to June 28, 1980, as a pre-condition to presentation of further evidence to the Administrator regarding activities in the area in conflict.

(v) In making his determination, the Administrator may award the entire area in conflict to one applicant involved in the conflict, or he may apportion the area among any or all of the applicants involved in the conflict. If, after applying the principles of equity, the Administrator determines that the area in conflict should be apportioned, the Administrator shall (to the maximum extent practicable consistent with the Administrator's application of the principles of equity) apportion the area in a manner designed to satisfy the plan of work set forth in the application of each applicant which is awarded part of the area.

(vi) Each applicant involved in the conflict must file an amendment to its application if necessary to implement the determination made by the Administrator.

(k) *Unresolved international conflicts.* (1) If, by November 17, 1982, all applicants involved in an original or new international conflict have not resolved that conflict, or agreed in writing to submit the conflict to a specified binding conflict resolution procedure, the applicants shall proceed in accordance with the conflict resolution procedures agreed to between the United States and its reciprocating states pursuant to section 118 of the Act.

(2) Each applicant whose application is involved in an international conflict shall be responsible for actions required in the conduct of the conflict resolution procedures, including bearing a proportional cost of implementing the procedures, representing himself in any proceedings, and assisting in the selection of arbitrators if necessary.

(l) *Continued opportunity for voluntary resolutions.* Each applicant may resolve any conflict by voluntary procedures at any time while that conflict persists.

(m) *Effect on priorities of new entrants.* (1) A pre-enactment explorer is entitled to a priority of right over a new entrant for any area in which the pre-enactment explorer has engaged in exploration prior to June 28, 1980 if, with respect to that area, the pre-enactment explorer files an application in accordance with this part on or after January 25, 1982 and on or before the closing date for pre-enactment explorer applications established under § 970.301(b).

(2) Any amendment which is filed by a pre-enactment explorer on or before October 15, 1982, relates back to the date of filing of the original application and shall give the pre-enactment explorer priority of right over all new entrants if the amendment is accorded a pre-enactment explorer priority of right under paragraph (g) of this section.

[47 FR 24948, July 8, 1982, as amended at 54 FR 548, Jan. 6, 1989]

§ 970.303 Procedures for new entrants.

(a) *Filing of new entrant applications or amendments; priority of right.* New entrant applications or amendments must be filed in accordance with § 970.200. A new entrant may file an application or amendment only at or after 1500 hours G.m.t. (11:00 a.m. EDT) January 3, 1983. All applications or amendments filed at that time shall be deemed to be filed simultaneously, and, if in accordance with § 970.209, shall have priority of right over any application or amendment filed subsequently. Priority of right for any application or amendment filed after that time will be established as described in § 970.209.

(b) *Conflicts.* (1) If a domestic conflict exists between or among new entrant applications or amendments, the applicants involved in the conflict shall resolve it.

(2) If an international conflict exists between or among new entrant applications or amendments, the conflict shall be resolved in accordance with applicable conflict resolution procedures agreed to between the United States and its reciprocating States pursuant to section 118 of the Act. The Administrator will provide each domestic applicant involved in an international conflict a copy of any such procedures in force when the Administrator issues notice to the applicant that an international conflict exists. Each applicant whose application is involved in an international conflict shall be responsible for actions required in the conduct of the conflict resolution procedures, including bearing a proportional cost of implementing the procedures, representing himself in any proceedings, and assisting in the selection of arbitrators if necessary.

§ 970.304 Action on portions of applications or amendments not in conflict.

If an applicant so requests, the Administrator will proceed in accordance with this part to review that portion of an area included in an application or amendment that is not involved in a conflict. However, the Administrator will proceed with such review only if the applicant advises the Administrator in writing that the applicant will continue to seek a license for the proposed exploration activities in the portion of the application area that is not in conflict. To the extent practicable, the deadlines for certification of an application or amendment and issuance of a license provided in § 970.400 and § 970.500, respectively, will run from the date of filing of the original application.

Subpart D—Certification of Applications

SOURCE: 46 FR 45902, Sept. 15, 1981, unless otherwise noted.

§ 970.400 General.

(a) Certification is an intermediate step between receipt of an application for issuance or transfer of a license and its actual issuance or transfer. It is a determination which focuses on the eligibility of the applicant.

(b) Before the Administrator may certify an application for issuance or transfer of a license, he must determine that issuance of the license would not violate any of the restrictions in § 970.103(b). He also must make written determinations with respect to the requirements set forth in §§ 970.401 through 970.406. This will be done after consultation with other departments and agencies pursuant to § 970.211.

(c) To the maximum extent possible, the Administrator will endeavor to complete certification of an application within 100 days after submission of an application which is in full compliance with Subpart B of this part. If final certification or denial of certification has not occurred within 100 days after such submission of the application, the Administrator will inform the applicant in writing of the pending unresolved issues, the agency's efforts to resolve them, and an estimate of the time required to do so.

§ 970.401 Financial responsibility.

(a) Before the Administrator may certify an application for an exploration license he must find that the applicant has demonstrated that, upon issuance or transfer of the license, the applicant will be financially responsible to meet all obligations which he may require to engage in the exploration proposed in the application.

(b) In order for the Administrator to make this determination, the applicant must show to the Administrator's satisfaction that he is reasonably capable of committing or raising sufficient resources to carry out, in accordance with the provisions contained in this part, the exploration program set forth in his exploration plan.

§ 970.402 Technological capability.

(a) Before the Administrator may certify an application for an exploration license, he must find that the applicant has demonstrated that, upon issuance or transfer of the license, the applicant will possess, or have access to or a reasonable expectation of obtaining, the technological capability to engage in the proposed exploration.

(b) In order for the Administrator to make this determination, the applicant must demonstrate to the Administrator's satisfaction that the applicant will possess or have access to, at the time of issuance or transfer of the license, the technology and expertise, as needed, to carry out the exploration program set forth in his exploration plan.

§ 970.403 Previous license and permit obligations.

In order to certify an application, the Administrator must find that the applicant has satisfactorily fulfilled all past obligations under any license or permit previously issued or transferred to the applicant under the Act.

§ 970.404 Adequate exploration plan.

Before he may certify an application, the Administrator must find that the proposed exploration plan of the applicant meets the requirements of § 970.203.

§ 970.405 Appropriate exploration site size and location.

Before the Administrator may certify an application, he must approve the size and location of the exploration area selected by the applicant. The Administrator will approve the size and location of the area unless he determines that the area is not a logical mining unit pursuant to § 970.601.

§ 970.406 Fee payment.

Before the Administrator may cert fy an application, he must find tha the applicant has paid the license fe as specified in § 970.208.

§ 970.407 Denial of certification.

(a) The Administrator may deny cer tification of an application if he finds that the requirements of this subpart have not been met. If, in the course of reviewing an application for certification, the Administrator becomes aware of the fact that one or more of the requirements for issuance or transfer under §§ 970.503 through 970.507 will not be met, he may also deny certification of the application.

(b) When the Administrator proposes to deny certification he will send to the applicant, and publish in the FEDERAL REGISTER, written notice of intention to deny certification. Such notice will include:

(1) The basis upon which the Administrator proposes to deny certification; and

(2) If the basis for the proposed denial is a deficiency which the Administrator believes the applicant can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (the period of time may not exceed 180 days except as specified by the Administrator for good cause).

(c) The Administrator will deny certification:

(1) On the 30th day after the date the notice is sent to the applicant, under paragraph (b) of this section, unless before such 30th day the applicant files with the Administrator a written request for an administrative review of the proposed denial; or

(2) On the last day of the period established under paragraph (b)(2)(ii) of this section in which the applicant must correct a deficiency, if such deficiency has not been corrected before such day and an administrative review requested pursuant to paragraph (c)(1) of this section is not pending or in progress.

(d) If a timely request for administrative review of the proposed denial is made by the applicant under paragraph (c)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with Subpart I of 15 CFR Part 971. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempts to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(e) If the Administrator denies certification, he will send to the applicant written notice of the denial, including the reasons therefor.

(f) Any final determination by the Administrator granting or denying certification is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

[46 FR 45902, Sept. 15, 1981, as amended at 54 FR 547, Jan. 6, 1989]

§ 970.408 Notice of certification.

Upon making a final determination to certify an application for an exploration license, the Administrator will promptly send written notice of his determination to the applicant.

Subpart E—Issuance/Transfer/Terms, Conditions and Restrictions

SOURCE: 46 FR 45903, Sept. 15, 1981, unless otherwise noted.

§ 970.500 General.

(a) *Proposal.* After certification of an application pursuant to Subpart D of this part, the Administrator will proceed with a proposal to issue or transfer a license for the exploration activities described in the application.

(b)(1) *Terms, conditions and restrictions.* Within 180 days (or such longer period as the Administrator may establish for good cause shown in writing) after certification, the Administrator will propose terms and conditions for, and restrictions on, the proposed exploration which are consistent with the provisions of the Act and this part as set forth in §§ 970.517 through 970.524. Proposed and final terms, conditions and restrictions will be uniform in all licenses, except to the extent that differing physical and environmental conditions require the establishment of special terms, conditions and restrictions for the conservation of natural resources, protection of the environment, or the safety of life and property at sea. The Administrator will propose these in writing to the applicant. Also, public notice thereof will be provided pursuant to § 970.501, and they will be included with the draft of the EIS on the issuance of a license which is required by section 109(d) of the Act.

(2) If the Administrator does not propose terms, conditions and restrictions within 180 days after certification, he will notify the applicant in writing of the reasons for the delay and will indicate the approximate date on which the proposed terms, conditions and restrictions will be completed.

(c) *Findings.* Before issuing or transferring an exploration license, the Administrator must make written findings in accordance with the requirements of §§ 970.503 through 970.507. These findings will be made after considering all information submitted with respect to the application and proposed issuance or transfer. He will make a final determination on issuance or transfer of a license, and will publish a final EIS on that action, within 180 days (or such longer period of time as he may establish for good cause shown in writing) following the date on which proposed terms, conditions and restrictions, and the draft EIS, are published.

ISSUANCE/TRANSFER; MODIFICATION/REVISION; SUSPENSION/REVOCATION

§ 970.501 Proposal to issue or transfer and of terms, conditions and restrictions.

(a) *Notice and comment.* The Administrator will publish in the FEDERAL REGISTER notice of each proposal to issue or transfer, and of terms and conditions for, and restrictions on, an exploration license. Subject to 15 CFR 971.802, interested persons will be permitted to examine the materials relevant to such proposals. Interested persons will have at least 60 days after publication of such notice to submit written comments to the Administrator.

(b) *Hearings.* (1) The Administrator will hold a public hearing in an appropriate location and may employ such additional methods as he deems appropriate to inform interested persons about each proposal and to invite their comments thereon.

(2) If the Administrator determines there exists one or more specific and material factual issues which require resolution by formal processes, at least one formal hearing will be held in the District of Columbia metropolitan area in accordance with the provisions of Subpart I of 15 CFR Part 971. The record developed in any such formal hearing will be part of the basis for the Administrator's decisions on issuance or transfer of, and of terms, conditions and restrictions for the license.

(c) Hearings held pursuant to this section will be consolidated insofar as practicable with hearings held by other agencies.

[46 FR 45903, Sept. 15, 1981, as amended at 54 FR 548, Jan. 6, 1989]

§ 970.502 Consultation and cooperation with Federal agencies.

Prior to the issuance or transfer of an exploration license, the Administrator will continue the consultation and cooperation with other Federal agencies which were initiated pursuant to § 970.211. This consultation will be to assure compliance with, among other statutes, the Endangered Species Act of 1973, as amended, the Marine Mammal Protection Act of 1972, as amended, and the Fish and Wildlife Coordination Act. He also will consult, prior to any issuance, transfer, modification or renewal of a license, with any affected Regional Fishery Management Council established pursuant to section 302 of the Fishery Conservation and Management Act of 1976 (16 U.S.C. 1852) if the activities undertaken pursuant to such license could adversely affect any fishery within the Fishery Conservation Zone, or any anadromous species or Continental Shelf fishery resource subject to the exclusive management authority of the United States beyond such zone.

§ 970.503 Freedom of the high seas.

(a) Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application will not unreasonably interfere with the exercise of the freedoms of the high seas by other nations, as recognized under general principles of international law.

(b) In making this finding, the Administrator will recognize that exploration for hard mineral resources of the deep seabed is a freedom of the high seas. In the exercise of this right, each licensee must act with reasonable regard for the interests of other nations in their exercise of the freedoms of the high seas.

(c)(1) In the event of a conflict between the exploration program of an applicant or licensee and a competing use of the high seas by another nation or its nationals, the Administrator, in consultation and cooperation with the Department of State and other interested agencies, will enter into negotiations with that nation to resolve the conflict. To the maximum extent possible the Administrator will endeavor to resolve the conflict in a manner that will allow both uses to take place in a manner in which neither will unreasonably interfere with the other.

(2) If both uses cannot be conducted harmoniously in the area subject to the exploration plan, the Administrator will decide whether to issue or transfer the license.

§ 970.504 International obligations of the United States.

Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application will not conflict with any international obligation of the United States established by any treaty or international convention in force with respect to the United States.

§ 970.505 Breach of international peace and security involving armed conflict.

Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application will not create a situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict.

§ 970.506 Environmental effects.

Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application cannot reasonably be expected to result in a significant adverse effect on the quality of the environment, taking into account the analyses and information in any applicable EIS prepared pursuant to section 109(c) or 109(d) of the Act. This finding also will be based upon the considerations and approach in § 970.701.

§ 970.507 Safety at sea.

Before issuing or transferring an exploration license, the Administrator must find that the exploration proposed in the application will not pose an inordinate threat to the safety of life and property at sea. This finding will be based on the requirements reflected in §§ 970.205 and 970.801.

§ 970.508 Denial of issuance or transfer.

(a) The Administrator may deny issuance or transfer of a license if he finds that the applicant or the proposed exploration activities do not meet the requirements of this part for the issuance or transfer of a license.

(b) When the Administrator proposes to deny issuance or transfer, he will send to the applicant, and publish in the FEDERAL REGISTER, written notice of such intention to deny issuance or transfer. Such notice will include:

(1) The basis upon which the Administrator proposes to deny issuance or transfer; and

(2) If the basis for the proposed denial is a deficiency which the Administrator believes the applicant can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (the period of time may not exceed 180 days except as specified by the Administrator for good cause).

The FEDERAL REGISTER notice will not include the coordinates of the proposed exploration area.

(c) The Administrator will deny issuance or transfer:

(1) On the 30th day after the date the notice is sent to the applicant under paragraph (b) of this section, unless before such 30th day the applicant files with the Administrator a written request for an administrative review of the proposed denial; or

(2) On the last day of the period established under paragraph (b)(2)(ii) of this section in which the applicant must correct a deficiency, if such deficiency has not been corrected before such day and an administrative review requested pursuant to paragraph (c)(1) of this section is not pending or in progress.

(d) If a timely request for administrative review of the proposed denial is made by the applicant under paragraph (c)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with Subpart I of 15 CFR Part 971. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempt to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(e) If the Administrator denies issuance or transfer, he will send to the applicant written notice of the denial, including the reasons therefor.

(f) Any final determination by the Administrator granting or denying issuance of a license is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

[46 FR 45903, Sept. 15, 1981, as amended at 54 FR 548, Jan. 6, 1989]

§ 970.509 Notice of issuance or transfer.

If the Administrator finds that the requirements of this part have been met, he will issue or transfer the license along with the appropriate terms, conditions and restrictions. Notification thereof will be made in writing to the applicant and in the FEDERAL REGISTER.

§ 970.510 Objections to terms, conditions and restrictions.

(a) The licensee may file a notice of objection to any term, condition or restriction in the license. The licensee may object on the grounds that any term, condition or restriction is inconsistent with the Act or this part, or on any other grounds which may be raised under applicable provisions of law. If the licensee does not file notice of an objection within the 60-day period immediately following the licensee's receipt of the notice of issuance or transfer under § 970.509, he will be deemed conclusively to have accepted the terms, conditions and restrictions in the license.

(b) Any notice of objection filed under paragraph (a) of this section must be in writing, must contain the precise legal basis for the objection, and must provide information relevant to any underlying factual issues deemed by the licensee as necessary to the Administrator's decision upon the objection.

(c) Within 90 days after receipt of the notice of objection, the Administrator will act on the objection and publish in the FEDERAL REGISTER, as well as provide to the licensee, written notice of his decision.

(d) If, after the Administrator takes final action on an objection, the licensee demonstrates that a dispute remains on a material issue of fact, the Administrator will provide for a formal hearing which will proceed in accordance with Subpart I of 15 CFR Part 971.

(e) Any final determination by the Administrator on an objection to terms, conditions or restrictions in a license after the formal hearing provided in paragraph (d) of this section is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

[46 FR 45903, Sept. 15, 1981, as amended at 54 FR 548, Jan. 6, 1989]

§ 970.511 Suspension or modification of activities; suspension or revocation of licenses.

(a) The Administrator may:

(1) In addition to, or in lieu of, the imposition of any civil penalty under Subpart J of 15 CFR Part 971, or in addition to the imposition of any fine under Subpart J, suspend or revoke any license issued under this part, or suspend or modify any particular activities under such a license, if the licensee substantially fails to comply with any provision of the Act, this part, or any term, condition or restriction of the license; and

(2) Suspend or modify particular activities under any license, if the President determines that such suspension or modification is necessary:

(i) To avoid any conflict with any international obligation of the United States established by any treaty or convention in force with respect to the United States; or

(ii) To avoid any situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict.

(b) Any action taken by the Administrator in accordance with paragraph (a)(1) will proceed pursuant to the procedures in 15 CFR 971.1003. Any action taken in accordance with paragraph (a)(2) will proceed pursuant to paragraphs (c) through (i) of this section, other than paragraph (h)(2).

(c) Prior to taking any action specified in paragraph (a)(2) of this section the Administrator will publish in the FEDERAL REGISTER, and send to the licensee, written notice of the proposed action. The notice will include:

(1) The basis of the proposed action; and

(2) If the basis for the proposed action is a deficiency which the Administrator believes the licensee can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (this period of time may not exceed 180 days except as specified by the Administrator for good cause).

(d) The Administrator will take the proposed action:

(1) On the 30th day after the date the notice is sent to the licensee, under paragraph (c) of this section, unless before such 30th day the licensee files with the Administrator a written request for an administrative review of the proposed action; or

(2) On the last day of the period established under paragraph (c)(2)(ii) of this section in which the licensee must correct the deficiency, if such deficiency has not been corrected before such day and an administrative review requested pursuant to paragraph (d)(1)

of this section is not pending or in progress.

(e) If a timely request for administrative review of the proposed action is made by the licensee under paragraph (d)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with Subpart I of 15 CFR Part 971. If the proposed action is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempt to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(f) The Administrator will serve on the licensee, and publish in the FEDERAL REGISTER, written notice of the action taken including the reasons therefor.

(g) Any final determination by the Administrator to take the proposed action is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

(h) The issuance of any notice of proposed action under this section will not affect the continuation of exploration activities by a licensee, except as provided in paragraph (i) of this section.

(i) The provisions of paragraphs (c), (d), (e) and (h) of this section will not apply when:

(1) The President determines by Executive Order that an immediate suspension of a license, or immediate suspension or modification of particular activities under such license, is necessary for the reasons set forth in paragraph (a)(2) of this section; or

(2) The Administrator determines that immediate suspension of such a license, or immediate suspension or modification of particular activities under a license, is necessary to prevent a significant adverse effect on the environment or to preserve the safety of life or property at sea, and the Administrator issues an emergency order in accordance with § 971.1003(d)(4).

(j) The Administrator will immediately rescind the emergency order as soon as he has determined that the cause for the order has been removed.

[46 FR 45903, Sept. 15, 1981, as amended at 54 FR 548, Jan. 6, 1989]

§ 970.512 Modification of terms, conditions and restrictions.

(a) After issuance or transfer of any license, the Administrator, after consultation with interested agencies and the licensee, may modify any term, condition, or restriction in such license for the following purposes:

(1) To avoid unreasonable interference with the interests of other nations in their exercise of the freedoms of the high seas, as recognized under general principles of international law. This determination will take into account the provisions of § 970.503;

(2) If relevant data and other information (including, but not limited to, data resulting from exploration activities under the license) indicate that modification is required to protect the quality of the environment or to promote the safety of life and property at sea;

(3) To avoid a conflict with any international obligation of the United States, established by any treaty or convention in force with respect to the United States, as determined in writing by the President; or

(4) To avoid any situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict, as determined in writing by the President.

(b) The procedures for objection to the modification of a term, condition or restriction will be the same as those for objection to an original term, condition or restriction under § 970.510, except that the period for filing notice of objection will run from the receipt of notice of proposed modification. Public notice of proposed modifications under this section will be made according to § 970.514. On or before the date of publication of public notice, written notice will be provided to the licensee.

[46 FR 45903, Sept. 15, 1981; 47 FR 5966, Feb. 9, 1982]

§ 970.513 Revision of a license.

(a) During the term of an exploration license, the licensee may submit to the Administrator an application for a revision of the license or the exploration plan associated with it. NOAA recognizes that changes in circumstances encountered, and in information and technology developed, by the licensee during exploration may require such revisions. In some cases it may even be advisable to recognize at the time of filing the original license application that although the essential information for issuing or transferring a license as specified in §§ 970.201 through 920.208 must be included in such application, some details may have to be provided in the future in the form of a revision. In such instances, the Administrator may issue or transfer a license which would authorize exploration activities and plans only to the extent described in the application.

(b) The Administrator will approve such application for a revision upon a finding in writing that the revision will comply with the requirements of the Act and this part.

(c) A change which would require an application to and approval by the Administrator as a revision is a major change in one or more of:

(1) The bases for certifying the original application pursuant to §§ 970.401 through 970.406;

(2) The bases for issuing or transferring the license pursuant to §§ 970.503 through 970.507; or

(3) The terms, conditions and restrictions issued for the license pursuant to §§ 970.517 through 970.524.

A major change is one which is of such significance so as to raise a question as to:

(i) The applicant's ability to meet the requirements of the sections cited in paragraphs (c) (1) and (2) of this section; or

(ii) The sufficiency of the terms, conditions and restrictions to accomplish their intended purpose.

§ 970.514 Scale requiring application procedures.

(a) A proposal by the Administrator to modify a term, condition or restriction in a license pursuant to § 970.512, or an application by a licensee for revision of a license or exploration plan pursuant to § 970.513, is significant, and the full application requirements and procedures will apply, if it would result in other than an incidental:

(1) Increase in the size of the exploration area; or

(2) Change in the location of the area.

An incidental increase or change is that which equals two percent or less of the original exploration area, so long as such adjustment is contiguous to the licensed area.

(b) All proposed modifications or revisions other than described in paragraph (a) of this section will be acted on after a notice thereof is published by the Administrator in the FEDERAL REGISTER, with a 60-day opportunity for public comment. On a case-by-case basis, the Administrator will determine if other procedures, such as a public hearing in a potentially affected area, are warranted. Notice of the Administrator's decision on the proposed modification will be provided to the licensee in writing and published in the FEDERAL REGISTER.

§ 970.515 Duration of a license.

(a) Each exploration license will be issued for a period of 10 years.

(b) If the licensee has substantially complied with the license and its associated exploration plan and requests an extension of the license, the Administrator will extend the license on terms, conditions and restrictions consistent with the Act and this part for a period of not more than 5 years.

In determining substantial compliance for purposes of this section, the Administrator may make allowance for deviation from the exploration plan for good cause, such as significantly changed market conditions. However, a request for extension must be accompanied by an amended exploration plan to govern the activities by the licensee during the extended period.

(c) Successive extensions may be requested, and will be granted by the Administrator, based on the criteria, and for the length of time, specified in paragraph (b) of this section.

§ 970.516 Approval of license transfers.

(a) The Administrator may transfer a license after a written request by the licensee. After a licensee submits such a request to the Administrator, the proposed transferee will be deemed an applicant for an exploration license, and will be subject to the requirements and procedures of this part.

(b) The Administrator will transfer a license if the proposed transferee and exploration activities meet the requirements of the Act and this part, and if the proposed transfer is in the public interest. The Administrator will presume that the transfer is in the public interest if it meets the requirements of the Act and this part. In case of mere change in the form or ownership of a licensee, the Administrator may waive relevant determinations for requirements for which no changes have occurred since the preceding application.

TERMS, CONDITIONS, AND RESTRICTIONS

§ 970.517 Diligence requirements.

The terms, conditions and restrictions in each exploration license must include provisions to assure diligent development. The Administrator will establish these pursuant to § 970.602.

§ 970.518 Environmental protection requirements.

(a) Each exploration license must contain such terms, conditions and restrictions, established by the Administrator, which prescribe actions the licensee must take in the conduct of exploration activities to assure protection of the environment. The Administrator will establish these pursuant to § 970.702.

(b) Before establishing the terms, conditions and restrictions pertaining to environmental protection, the Administrator will consult with the Administrator of the Environmental Protection Agency, the Secretary of State and the Secretary of the department in which the Coast Guard is operating. He also will take into account and give due consideration to the information contained in the final EIS prepared with respect to that proposed license.

§ 970.519 Resource conservation requirements.

For the purpose of conservation of natural resources, each license issued under this part will contain, as needed, terms, conditions and restrictions which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the hard mineral resources in the license area. The Administrator will establish these pursuant to § 970.603.

§ 970.520 Freedom of the high seas requirements.

Each license issued under this part must include such restrictions as may be necessary and appropriate to ensure that the exploration activities do not unreasonably interfere with the interests of other nations in their exercise of the freedoms of the high seas, as recognized under general principles of international law, such as fishing, navigation, submarine pipeline and cable laying, and scientific research. The Administrator will consider the provisions in § 970.503 in establishing these restrictions.

§ 970.521 Safety at sea requirements.

The Secretary of the department in which the Coast Guard is operating, in consultation with the Administrator, will require in any license issued under this part, in conformity with principles of international law, that vessels documented under the laws of the United States and used in activities authorized under the license comply with conditions regarding the design, construction, alteration, repair, equipment, operation, manning and maintenance relating to vessel and crew safety and the promotion of safety of life and property at sea. These requirements will be established with reference to Subpart H of this part.

§ 970.522 Monitoring requirements.

Each exploration license must require the licensee:

(a) To allow the Administrator to place appropriate Federal officers or employees as observers aboard vessels used by the licensee in exploration activities to:

(1) Monitor such activities at such time, and to such extent, as the Administrator deems reasonable and necessary to assess the effectiveness of the terms, conditions, and restrictions of the license; and

(2) Report to the Administrator whenever such officers or employees have reason to believe there is a failure to comply with such terms, conditions, and restrictions;

(b) To cooperate with such officers and employees in the performance of monitoring functions; and

(c) To monitor the environmental effects of the exploration activities in accordance with a monitoring plan approved and issued by the Administrator as license terms, conditions and restrictions, and to submit such information as the Administrator finds to be necessary and appropriate to assess environmental impacts and to develop and evaluate possible methods of mitigating adverse environmental effects. This environmental monitoring plan and reporting will respond to the concerns and procedures discussed in Subpart G of this part.

§ 970.523 Special terms, conditions, and restrictions.

Although the general criteria and standards to be used in establishing terms, conditions, and restrictions for a license are set forth in this part, as referenced in §§ 970.517 through 970.522, the Administrator may impose special terms, conditions, and restrictions for the conservation of natural resources, protection of the environment, or the safety of life and property at sea when required by differing physical and environmental conditions.

§ 970.524 Other Federal requirements.

Pursuant to § 970.211, another Federal agency, upon review of an exploration license application submitted under this part, may indicate how terms, conditions, and restrictions might be added to the license, to assure compliance with any law or regulation within that agency's area of responsibility. In response to the intent, reflected in section 103(e) of the Act, to reduce the number of separate actions to satisfy the statutory responsibilities of these agencies, the Administrator may include such terms, conditions, and restrictions in a license.

Subpart F—Resource Development Concepts

SOURCE: 46 FR 45907, Sept. 15, 1981, unless otherwise noted.

§ 970.600 General.

Several provisions in the Act relate to appropriate mining techniques or mining efficiency. These raise what could be characterized as resource development issues. In particular, under section 103(a)(2)(D) of the Act, the applicant will select the size and location of the area of an exploration plan, which will be approved unless the Administrator finds that the area is not a "logical mining unit." Also, pursuant to section 108 of the Act the applicant's exploration plan and the terms, conditions and restrictions of each license must be designed to ensure diligent development. In addition, for the purpose of conservation of natural resources, section 110 of the Act provides that each license is to contain, but only as needed, terms, conditions, and restrictions which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the resources.

§ 970.601 Logical mining unit.

(a) In the case of an exploration license, a logical mining unit is an area of the deep seabed which can be explored under the license, and within the 10-year license period, in an efficient, economical and orderly manner with due regard for conservation and protection of the environment, taking into consideration the resource data, other relevant physical and environmental characteristics, and the state of the technology of the applicant as set forth in the exploration plan. In addition, it must be of sufficient size to allow for intensive exploration.

(b) Approval by the Administrator of a proposed exploration logical mining unit will be based on a case-by-case review of each application. In order to provide a proper basis for this evaluation, the applicant's exploration plan should describe the seabed topography, the location of mineral deposits and the nature of planned equipment and operations. Also, the exploration plan must show the relationship between the area to be explored and the applicant's plans for commercial recovery volume, to the extent projected in the exploration plan.

(c) In delineating an exploration area, the applicant need not include unmineable areas. Thus, the area need not consist of contiguous segments, as long as each segment would be efficiently mineable and the total proposed area constitutes a logical mining unit. In describing the area, the applicant must present the geodetic coordinates of the points defining the boundaries, referred to the World Geodetic System (WGS) Datum. A boundary between points must be a geodesic. If grid coordinates are desired, the Universal Transverse Mercator Grid System must be used.

(d) At the applicant's option, for the purpose of satisfying a possible obligation under a future Law of the Sea Treaty, the applicant may propose an exploration area which includes two exploration logical mining units. The applicant should specify in the application if this "banking" option is chosen, and any applicant choosing this option and filing an application based on pre-enactment exploration under § 970.301 shall so notify the Administrator in accordance with § 970.301(g).

(e) Applicants are advised that NOAA will not accept an application or issue a license for an exploration area larger than 150,000 square kilometers unless the applicant can demonstrate the necessity of a larger area based on factors such as topography, nodule abundance, distribution and ore grade. If the applicant elects to pursue the "banking" option described in paragraph (d) of this section, and wishes to apply for an exploration area larger than 150,000 square kilometers, the applicant must file a second application with respect to at least the area in excess of 150,000 square kilometers, unless the applicant justifies such excess area as part of a single application under the preceding sentence.

[46 FR 45907, Sept. 15, 1981, as amended at 47 FR 5968, Feb. 9, 1982]

§ 970.602 Diligent exploration.

(a) Each licensee must pursue diligently the activities described in his approved exploration plan. This requirement applies to the full scope of the plan, including environmental safeguards and monitoring systems. To help assure this diligence, terms, conditions and restrictions which the Administrator issues with a license will require such periodic reasonable expenditures for exploration by the licensee as the Administrator may establish, taking into account the size of the area of the deep seabed to which the exploration plan applies and the amount of funds which is estimated by the Administrator to be required during exploration for commercial recovery of hard mineral resources to begin within the time limit established by the Administrator. However, such required expenditures will not be established at a level which would discourage exploration by persons with less costly technology than is prevalently in use.

(b) In order to fulfill the diligence requirement, the applicant first must propose to the Administrator an estimated schedule of activities and expenditures pursuant to § 970.203(b) (3) and (6). The schedule must show, and the Administrator must be able to make a reasonable determination, that the applicant can complete his exploration activities within the term of the license. In this regard, there must be a reasonable relationship between the size of the exploration area and the financial and technological resources reflected in the application. Also, the exploration must clearly point toward developing the ability, by the end of the 10-year license period, to apply for and obtain a permit for commercial recovery.

(c) Ultimately, the diligence requirement will involve a retrospective determination by the Administrator, based on the licensee's reasonable conformance to the approved exploration plan. Such determination, however, will take into account the need for some degree of flexibility in an exploration plan. It also will include consideration of the needs and stage of development of each licensee, again based on the approved exploration plan. In addition, the determination will take account of legitimate periods of time when there is no or very low expenditure, and will allow for a certain degree of flexibility for changes encountered by the licensee in such factors as its resource knowledge and financial considerations.

(d) In order for the Administrator to make determinations on a licensee's adherence to the diligence requirements, the licensee must submit a report annually reflecting his conformance to the schedule of activities and expenditures contained in the license. In case of any changes requiring a revision to an approved license and exploration plan, the licensee must advise the Administrator in accordance with § 970.513.

§ 970.603 Conservation of resources.

(a) With respect to the exploration phase of seabed mining, the requirement for the conservation of natural resources, encompassing due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the hard mineral resources in the area to which the license applies, may not be particularly relevant. Thus, since the Act requires such terms, conditions and restrictions only as needed, exploration licenses will require such provisions only as the Administrator deems necessary.

(b) NOAA views license phase mining system tests as an opportunity to examine, with industry, the conservation implications of any mining patterns used. Thus, in order to develop information needed for future decisions during commercial recovery, NOAA will include with a license a requirement for the submission of collector track and nodule production data. Only if information submitted reflects that the integrated system tests are resulting in undue waste or threatening the future opportunity for commercial recovery of the unrecovered balance of hard mineral resources will the Administrator modify the terms, conditions or restrictions pertaining to the conservation of natural resources, in order to address such problems.

(c) If the Administrator so modifies such terms, conditions and restrictions relating to conservation of resources, he will employ a balancing process in the consideration of the state of the technology being developed, the processing system utilized and the value and potential use of any waste, the environmental effects of the exploration activities, economic and resource data, and the national need for hard mineral resources.

Subpart G—Environmental Effects

SOURCE: 46 FR 45908, Sept. 15, 1981, unless otherwise noted.

§ 970.700 General.

Congress, in authorizing the exploration for hard mineral resources under the Act, also enacted provisions relating to the protection of the marine environment from the effects of exploration activities. For example, before the Administrator may issue a license, pursuant to section 105(a)(4) of the Act he must find that the exploration proposed in an application cannot reasonably be expected to result in a significant adverse effect on the quality of the environment. Also, the Act requires in section 109(b) that each license issued by the Administrator must contain such terms, conditions and restrictions which prescribe the actions the licensee must take in the conduct of exploration activities to assure protection of the environment. Furthermore, the Act in section 105(c)(1)(B) provides for the modification by the Administrator of any term, condition or restriction if relevant data and other information indicates that modification is required to protect the quality of the environment. In addition, section 114 of the Act specifies that each license issued under the Act must require the licensee to monitor the environmental effects of the exploration activities in accordance with guidelines issued by the Administrator, and to submit such information as the Administrator finds to be necessary and appropriate to assess environmental impacts and to develop and evaluate possible methods of mitigating adverse environmental effects.

§ 970.701 Significant adverse environmental effects.

(a) *Activities with no significant impact.* NOAA believes that exploration activities of the type listed below are very similar or identical to activities considered in section 6(c)(3) of NOAA Directives Manual 02-10, and therefore have no potential for significant environmental impact, and will require no further environmental assessment.

(1) Gravity and magnetometric observations and measurements;

(2) Bottom and sub-bottom acoustic profiling or imaging without the use of explosives;

(3) Mineral sampling of a limited nature such as those using either core, grab or basket samplers;

(4) Water and biotic sampling, if the sampling does not adversely affect shellfish beds, marine mammals, or an endangered species, or if permitted by the National Marine Fisheries Service or another Federal agency;

(5) Meteorological observations and measurements, including the setting of instruments;

(6) Hydrographic and oceanographic observations and measurements, including the setting of instruments;

(7) Sampling by box core, small diameter core or grab sampler, to determine seabed geological or geotechnical properties;

(8) Television and still photographic observation and measurements;

(9) Shipboard mineral assaying and analysis; and

(10) Positioning systems, including bottom transponders and surface and subsurface buoys filed in *Notices to Mariners.*

(b) *Activities with potential impact.* (1) NOAA research has identified at-sea testing of recovery equipment and the operation of processing test facilities as activities which have some potential for significant environmental impacts during exploration. However, the research has revealed that only the following limited effects are expected to have potential for significant adverse environmental impact.

(2) The programmatic EIS's documents three at-sea effects of deep seabed mining which cumulatively during commercial recovery have the potential for significant effect. These three effects also occur during mining system tests that may be conducted under a license, but are expected to be insignificant. These include the following:

(i) *Destruction of benthos in and near the collector track.* Present information reflects that the impact from this effect during mining tests under exploration licenses will be extremely small.

(ii) *Blanketing of benthic fauna and dilution of food supply away from mine site subareas.* The settling of fine sediments disturbed by tests under a license of scale-model mining systems which simulate commercial recovery could adversely affect benthic fauna by blanketing, diluation of their food supply, or both. Because of the anticipated slow settling rate of the sediments, the affected area could be quite large. However, research results are insufficient to conclude that this will indeed be a problem.

(iii) *Surface plume effect on fish larvae.* The impact of demonstration-scale mining tests during exploration is expected to be insignificant.

(3) If processing facilities in the United States are planned to be used for testing during exploration, NOAA also will assess their impacts in the site-specific EIS developed for each license.

(c) *NOAA approach.* In making determinations on significant adverse environmental effects, the Administrator will draw on the above conclusions and other findings in NOAA's programmatic environmental statement and site-specific statements issued in accordance with the Act. He will issue licenses with terms, conditions and restrictions containing, as appropriate, environmental protection or mitigation requirements (pursuant to § 970.518) and monitoring requirements (pursuant to § 970.522). The focus of NOAA's environmental efforts will be on environmental research and on monitoring during mining tests to acquire more information on the environmental effects of deep seabed mining. If these efforts reveal that modification is required to protect the quality of the environment, NOAA then may modify terms, conditions and restrictions pursuant to § 970.512.

§ 970.702 Monitoring and mitigation of environmental effects.

(a) *Monitoring.* If an application is determined to be otherwise acceptable, the Administrator will specify an environmental monitoring plan as part of the terms, conditions and restrictions developed for each license. The plan will be based on the monotoring plan proposed by the applicant and reviewed by NOAA for completeness, accuracy and statistical reliability. This monitoring strategy will be devised to insure that the exploration activities do not deviate significantly from the approved exploration plan and to determine if the assessment of the plan's acceptability was sound. The monitoring plan, among other things, will include monitoring environmental parameters relating to verficiation of NOAA's findings concerning potential impacts, but relating mainly to the three unresolved concerns with the potential for significant environmental effect, as identified in § 970.701(b)(2). NOAA has developed a technical guidance document, which includes parameters pertaining to the upper and lower water column and operational aspects, which document will provide assistance in developing monitoring plans in consultation with applicants.

(b) *Mitigation.* Monitoring and continued research may develop information on future needs for mitigating environmental effects. If such needs are identified, terms, conditions and restrictions can be modified appropriately.

Subpart H—Safety of Life and Property at Sea

§ 970.800 General.

The Act contains requirements, in the context of several decisions, that relate to assuring the safety of life and property at sea. For instance, before the Administrator may issue a license, section 105(a)(5) of the Act requires that he find that the proposed exploration will not pose an inordinate threat to the safety of life and property at sea. Also, under section 112(a) of the Act the Coast Guard, in consultation with NOAA, must require in any license or permit issued under the Act, in conformity with principles of international law, that vessels documented in the United States and used in activities authorized under the license comply with conditions regarding the design, construction, alteration, repair, equipment, operation, manning and maintenance relating to vessel and crew safety and the safety of life and property at sea. In addition, under section 105(c)(1)(B) of the Act, the Administrator may modify terms, conditions and restrictions for a license if required to promote the safety of life and property at sea.

[46 FR 45909, Sept. 15, 1981]

§ 970.801 Criteria for safety of life and property at sea.

Response to the safety at sea requirements in essence will involve vessel inspection requirements. These inspection requirements may be identified by reference to present laws and regulations. The primary inspection statutes pertaining to United States flag vessels are: 46 U.S.C. 86 (Loadlines); 46 U.S.C. 395 (Inspection of seagoing barges over 100 gross tons); 46 U.S.C. 367 (Inspection of sea-going motor vessels over 300 gross tons); and 46 U.S.C. 404 (Inspection of vessels above 15 gross tons carrying freight for hire). All United States flag vessels will be required to meet existing regulatory requirements applicable to such vessels. This includes the requirement for a current valid Coast Guard Certificate of Inspection, as specified in § 970.205. Being United States flag, these vessels will be under United States jurisdiction on the high seas and subject to domestic enforcement procedures. With respect to foreign flag vessels, the SOLAS 74 or SOLAS 60 certificate requirements or alternative IACS requirements, as specified in § 970.205, apply.

[46 FR 45909, Sept. 15, 1981]

Subpart I—Miscellaneous

§ 970.900 Other applicable regulations.

The regulations in Subparts H, I and J of 15 CFR Part 971 are consolidated regulations and are applicable both to licenses under this part and to permits under 15 CFR Part 971. The regulations in Subparts H, I and J of Part 971 govern records to be maintained and information to be submitted by licensees and permittees, public disclosure of documents received by NOAA, relinquishment and surrender of licenses and permits, amendment of regulations, competition of time, uniform hearing procedures, and enforcement under the Act.

[54 FR 548, Jan. 6, 1989]

Subparts J-W—[Reserved]

Subpart X—Pre-enactment Exploration

§ 970.2401 Definitions.

(a) "Engage in exploration" means:

(1) To cause or authorize exploration to occur, including but not limited to a person's actions as a sponsor, principal, or purchaser of exploration services; or

(2) To conduct exploration on behalf of a person described in paragraph (a)(1) of this section.

[45 FR 76662, Nov. 20, 1980, as amended at 47 FR 5966, Feb. 9, 1982]

§ 970.2402 Notice of pre-enactment exploration.

(a) *General.* NOAA encourages any United States citizen who engaged in exploration for deep seabed hard mineral resources before June 28, 1980, to file not later than February 1, 1981, a written notice with the Administrator, in care of: The Director, Office of Ocean Minerals and Energy, National Oceanic and Atmospheric Administration, Department of Commerce, Page Building 1, Suite 410, 2001 Wisconsin Avenue, NW., Washington, DC 20235. Such notice shall not constitute an application for a license or permit and shall not confer or confirm any priority of right to any site.

(b) *Content of pre-enactment exploration Notice.* If a notice of exploration commenced prior to June 28, 1980, is filed pursuant to paragraph (a) it should be in writing and include the following:

(1) Names, addresses, and telephone numbers of the United States citizens responsible for exploration operations to whom notices and orders are to be delivered;

(2) A description of the citizen or citizens engaging in such exploration including:

(i) Whether the citizen is a natural person, partnership, corporation, joint venture, or other form of association;

(ii) The state of incorporation of state in which the partnership or other business entity is registered;

(iii) The name of registered agent and places of business;

(iv) Certification of essential and non-proprietary provisions in articles of incorporation, charter, or articles of association; and

(v) Membership of the association, partnership, or joint venture, including information about the participation of partners and joint venturers, and/or ownership of stock.

(3) A general description of the exploration activities conducted prior to June 28, 1980, including:

(i) The approximate date that the citizen, or predecessor in interest, commenced exploration activities;

(ii) A general estimate of expenditures made on the exploration program prior to June 28, 1980;

(iii) A statement of whether the citizen intends to file an application for an exploration license pursuant to section 101(b)(1)(A) of the Act after NOAA issues regulations implementing section 103(a) of the Act; and

(iv) A statement of whether the citizen intends to continue to engage in exploration as allowed by section 101(b) of the Act, pending a final determination on his application for an exploration license.

(c) *Exclusion of location information.* The information submitted in the notice of pre-enactment exploration required by this section shall *not* include the location of past or future exploration or prospective mine sites.

[45 FR 76662, Nov. 20, 1980]

Subpart Y—Pre-license Exploration

SOURCE: 45 FR 76662, Nov. 20, 1980, unless otherwise noted.

§ 970.2501 Notice of pre-license exploration voyages.

(a) *General.* Any United States citizen who schedules an exploration voyage to begin after November 20, 1980 shall file written notice with the Administrator which sets out:

(1) The name, address and telephone number of the citizen;

(2) The anticipated date of commencement of the voyage and its planned duration;

(3) The exploration activities to be carried out on the voyage, including a general description of the equipment and methods to be used, and an estimate of the anticipated extent of seabed disturbance and effluent discharge; and

(4) If the U.S. citizen has not filed a notice of pre-enactment exploration in accordance with § 970.2402, the information specified in § 970.2402(b).

(b) *When and where to file Notice of future exploration*—(1) *When.* (i) Except as allowed in paragraph (b)(2) of this section, the notice required by paragraph (a) of this section must be filed not later than 45 days prior to the date on which the exploration voyage is scheduled to begin.

(ii) With respect to filing of the information referred to in paragraph (a)(4) of this section, the filing dates specified in paragraph (b) of this section shall prevail over the date specified in § 970.2402(a).

(2) *Exception.* If an exploration voyage is scheduled to begin before January 5, 1981, the notice required by paragraph (a) of this section must be filed on or before December 22, 1980.

(3) *Where.* The notice required by paragraph (a) of this section must be filed in writing with the Administrator, at the address specified in § 970.2402(a) of this part.

§ 970.2502 Post voyage report.

Within 30 days of the conclusion of each exploration voyage, the United States citizen engaging in the voyage shall submit to NOAA a report containing any environmental data or information obtained during that voyage.

§ 970.2503 Suspension of exploration activities.

(a) The Administrator may issue an emergency order, either in writing or orally with written confirmation, requiring the immediate suspension of exploration activities or any particular exploration activity when, in his judgment, immediate suspension of such activity or activities is necessary to prevent a significant adverse effect on the environment. Upon receipt of notice of the emergency order, the United States citizen engaged in the exploration shall immediately cease the activity that is the subject of the emergency order. During any suspension NOAA will consult with the citizen engaged in the activity suspended concerning appropriate measures to remove the cause of suspension. A suspension may be rescinded at any time by written notice from the Administrator upon presentation of satisfactory evidence by the citizen that the activity will no longer threaten a significant adverse effect on the environment.

Subpart Z—Miscellaneous

§ 970.2601 Additional information.

Any United States citizen filing notice under § 970.2402 or § 970.2501 of this part shall provide such additional information as the Administrator may require as necessary and appropriate to implement section 101 of the Act.

[45 FR 76662, Nov. 20, 1980]

PART 971—DEEP SEABED MINING REGULATIONS FOR COMMERCIAL RECOVERY PERMITS

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AUTHORITY: 30 U.S.C. 1401 *et seq.*

SOURCE: 54 FR 525, Jan. 6, 1989, unless otherwise noted.

Subpart A—General

§ 971.100 Purpose.

The purpose of this part is to implement the responsibilities and authorities of the Administrator of the National Oceanic and Atmospheric Administration (NOAA) pursuant to Pub. L. 96-283, the Deep Seabed Hard Mineral Resources Act (the Act), to issue to eligible United States citizens permits for the commercial recovery of deep seabed hard minerals.

§ 971.101 Definitions.

For purposes of this part, the term

(a) "Act" means the Deep Seabed Hard Mineral Resources Act (Pub. L. 96-283; 94 Stat. 553; 30 U.S.C. 1401 *et seq.*);

(b) "Administrator" means the Administrator of the National Oceanic and Atmospheric Administration, or the Administrator's designee;

(c) "Affected State" means any State with a coastal zone management program approved under Section 306 of the Coastal Zone Management Act, as amended, where coastal zone land and water uses are affected by the issuance of a commercial recovery permit under the provisions of the Act or this part;

(d) "Applicant" means an applicant for a commercial recovery permit pursuant to the Act and this part; as used in subparts H, I and J of this part, "applicant" also means an applicant for an exploration license pursuant to the Act and Part 970 of the title. "Applicant" also means a proposed permit transferee;

(e) "Commercial recovery" means—

(1) Any activity engaged in at sea to recover any hard mineral resource at a substantial rate for the primary purpose of marketing or commercially using such resource to earn a net profit, whether or not such net profit is actually earned;

(2) If such recovered hard mineral resource will be processed at sea, such processing; and

(3) If the waste of such activity to recover any hard mineral resource, or of such processing at sea, will be disposed of at sea, such disposal;

(f) "Continental Shelf" means—

(1) The seabed and subsoil of the submarine areas adjacent to the coast, but outside the area of the territorial sea, to a depth of 200 meters or, beyond that limit to where the depth of the superjacent waters admits of the exploitation of the natural resources of such submarine area; and

(2) The seabed and subsoil of similar submarine areas adjacent to the coast of islands;

(g) "Controlling interest", for purposes of paragraph (v)(3) of this section, means a direct or indirect legal or beneficial interest in or influence over another person arising through ownership of capital stock, interlocking directorates or officers, contractual relations, or other similar means, which substantially affect the independent business behavior of such person;

(h) "Deep seabed" means the seabed, and the subsoil thereof to a depth of ten meters, lying seaward of and outside—

(1) The Continental Shelf of any nation; and

(2) Any area of national resource jurisdiction of any foreign nation, if such area extends beyond the Continental Shelf of such nation and such jurisdiction is recognized by the United States;

(i) "Environment" or "environmental" as used in the definitions of "irreparable harm" and "significant adverse environmental effect" means or pertains to the deep seabed and ocean waters lying at and within the permit area, and in surrounding areas including transportation corridors to the extent that they might be affected by the commercial recovery activities, and the living and non-living resources of those areas;

(j) "Exploration" means—

(1) Any at-sea observation and evaluation activity which has, as its objective, the establishment and documentation of—

(i) The nature, shape, concentration, location, and tenor of a hard mineral resource; and

(ii) The environmental, technical, and other appropriate factors which must be taken into account to achieve commercial recovery; and

(2) The taking from the deep seabed of such quantities of any hard mineral resource as are necessary for the design, fabrication and testing of equipment which is intended to be used in the commercial recovery and processing of such resource;

(k) "Hard mineral resource" means any deposit or accretion on, or just below, the surface of the deep seabed of nodules which include one or more minerals, at least one of which is manganese, nickel, cobalt, or copper;

(l) "Irreparable harm" means significant undesirable effects to the environment occurring after the date of the permit issuance which will not be reversed after cessation or modification of the activities authorized under the permit;

(m) "Licensee" means the holder of a license issued under NOAA regulations to engage in exploration;

(n) "NOAA" means the National Oceanic and Atmospheric Administration;

(o) "Permittee" means the holder of a permit issued or transferred under this part to engage in commercial recovery;

(p) "Person" means any United States citizen, any individual, and any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any nation;

(q) "Reciprocating state" means any foreign nation designated as such by the Administrator under section 118 of the Act;

(r) "Recovery plan" or "commercial recovery plan" means the plan submitted by an applicant for a commercial recovery permit pursuant to § 971.203;

(s) "Significant adverse environmental effect" means: (1) important adverse changes in ecosystem diversity, productivity, or stability of the biological communities within the environment; (2) threat to human health through direct exposure to pollutants or through consumption of exposed aquatic organisms; or (3) important loss of aesthetic, recreational, scientific or economic values;

(t) "State agency" means the agency responsible for implementing the responsibilities of Section 306(c)(5) under the Coastal Zone Management Act, as amended, and 15 CFR Part 930;

(u) "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the United States Virgin Islands, Guam, and any other Commonwealth, territory, or possession of the United States; and

(v) "United States citizen" means—

(1) Any individual who is a citizen of the United States;

(2) Any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any of the United States; and

(3) Any corporation, partnership, joint venture, association, or other entity (whether organized or existing under the laws of any of the United States or a foreign nation) if the controlling interest in such entity is held by an individual or entity described in paragraph (v)(1) or (v)(2).

§ 971.102 Nature of permits.

(a) A permit issued under this part authorizes the holder thereof to engage in commercial recovery within a specific portion of the sea floor consistent with the provisions of the Act and this part and consistent with the specific terms, conditions, and restrictions (TCRs) applied to the permit by the Administrator.

(b) A permit issued under this part is exclusive with respect to the holder thereof as against any other United States citizen or any citizen, national or governmental agency of, or any legal entity organized or existing under the laws of, any reciprocating state.

(c) A valid existing license under 15 CFR Part 970 will entitle the holder, if otherwise eligible under the provisions of the Act and implementing regulations, to a permit for commercial recovery from an area selected from within the license area. Such a permit will recognize the right of the holder to recover hard mineral resources, and to own, tranport, use, and sell hard mineral resources recovered under the permit and in accordance with the requirements of the Act and this part.

§ 971.103 Prohibited activities and restrictions.

(a) *Prohibited activities and exceptions.*

(1) No United States citizen may engage in any commercial recovery unless authorized to do so under—

(i) A permit issued pursuant to the Act and implementing regulations;

(ii) A license, permit or equivalent authorization issued by a reciprocating state; or

(iii) An international agreement which is in force with respect to the United States.

(2) The prohibitions of paragraph (a)(1) of this section do not apply to any of the following activities:

(i) Scientific research, including that concerning hard mineral resources;

(ii) Mapping, or the taking of any geophysical, geochemical, oceanographic, or atmospheric measurements or random bottom samplings of the deep seabed, if such taking does not significantly alter the surface or subsurface of the seabed or significantly affect the environment;

(iii) The design, construction, or testing of equipment and facilities which will or may be used for exploration or commercial recovery, if such design, construction or testing is conducted onshore, or does not involve the recovery of any but incidental hard mineral resources;

(iv) The furnishing of machinery, products, supplies, services, or materials for any exploration or commercial recovery conducted under a license or permit issued under the Act and implementing regulations, a license or permit or equivalent authorization issued by a reciprocating state, or any relevant international agreement; and

(v) Activities, other than exploration or commercial recovery activities, of the Federal Government.

(3) No United States citizen may interfere or participate in interference with any activity conducted by any permittee which is authorized to be undertaken under a permit issued by the Administrator to a permittee under the Act or with any activity conducted by the holder of, and authorized to be undertaken under, a license or permit or equivalent authorization issued by a reciprocating state for the commercial recovery of hard mineral resources. For purposes of this section, interference includes physical interference with activities authorized by the Act, this part, and a license or permit issued pursuant thereto; the filing of a specious claim in the United States or any other nation; and any other activity designed to harass, or which has the effect of harassing, persons conducting deep seabed mining activities authorized by law. Interference does not include the exercise of any superior rights granted to United States citizens by the Constitution of the United States, or any Federal or State law, treaty, or agreement or regulation promulgated pursuant thereto.

(4) United States citizens shall exercise their rights on the high seas with reasonable regard for the interests of other states in their exercise of the freedoms of the high seas.

(b) *Restrictions on issuance of permits.* The Administrator will not issue any permit—

(1) After the date on which any relevant international agreement is ratified by and enters into force with respect to the United States, except to the extent that issuance of the permit is not inconsistent with that agreement.

(2) The recovery plan of which, submitted pursuant to the Act and implementing regulations, would apply to an area to which applies, or would conflict with:

(i) Any exploration plan or recovery plan submitted with any pending application to which priority of right for issuance applies under 15 CFR Part 970 or this part;

(ii) Any exploration plan or recovery plan associated with any existing license or permit; or

(iii) An equivalent authorization which has been issued, or for which formal notice of application has been submitted, by a reciprocating state prior to the filing date of any relevant application for licenses or permits pursuant to the Act and implementing regulations;

(3) Authorizing commercial recovery within any area of the deep seabed in which exploration is authorized under a valid existing license if such permit is issued to a person other than the licensee for such area;

(4) Which authorizes commercial recovery to commence before January 1, 1988;

(5) The recovery plan for which applies to any area of the deep seabed if, within the 3-year period before the date of application for that permit:

(i) The applicant therefor surrendered or relinquished such area under an exploration plan or recovery plan associated with a previous license or permit issued to such applicant; or

(ii) A permit previously issued to the applicant had an exploration plan or recovery plan which applied to such area and such license or permit was revoked under section 106 of the Act;

(6) Or approve the transfer of a permit, except to a United States citizen; or

(7) That would authorize commercial recovery activities in an area other than for which the applicant therefore holds a valid exploration license under part 970 of this title.

§ 971.104 OMB control number.

The information collection requirements and reporting and recordkeeping requirements contained in this part were approved by the Office of Management and Budget under control number 0648-0170.

Subpart B—Applications

§ 971.200 General.

(a) *Who may apply; how.* Any United States citizen holding a valid exploration license may apply to the Administrator for issuance of a commercial recovery permit for all or part of the area to which the license applies. Any holder of a commercial recovery permit may apply to the Administrator for transfer of the permit. Applications must be submitted in the form and manner described in this subpart.

(b) *Place, form and copies.* An application for the issuance or transfer of a commerical recovery permit must be in writing, verified and signed by an authorized officer or other authorized representative of the applicant. The application and 25 copies thereof must be submitted to:

Ocean Minerals and Energy Division, Office of Ocean and Coatal Resource Management, National Oceanic and Atmospheric Administration, Suite 710, 1825 Connecticut Avenue, NW., Washington, DC 20235.

The Administrator may waive in whole or in part, at his discretion, the requirement that 25 copies of an application be filed with NOAA.

(c) *General contents.* The application must contain a proposed commerical recovery plan and the financial, technical, environmental and other information specified in this part, which in total are necessary for the Administrator to make the determinations required by the Act and this part. Although the ultimate standards for determinations under these rules are identical for both transferees and original preexisting licensees, NOAA anticipates that applicants who are transferees will have to supply more information with the application than licensees will [see subsection (e) in this section].

(d) *Identification of requirements.* Each portion of the application should identify the requirements of this part to which it responds.

(e) *Information previously submitted in connection with an exploration license.* Information previously submitted as part of an exploration license application, as well as information submitted during the course of license activities (such as data included in annual reports to NOAA), may be incorporated in the commercial recovery permit application by reference.

(f) *Request for confidential treatment of information.* If an applicant wishes to have any information in its application not be subject to public disclosure, it must so request, at the time of submitting the information, pursuant to § 971.802 which will govern disposition of the request.

(g) *Pre-application consultation.* The Administrator will make NOAA staff available to potential applicants for pre-application consultations on how to respond to the provisions of this part. In appropriate circumstances, the Administrator will provide written confirmation to the applicant of oral guidance resulting from such consultations. Such consultation is required for the purpose of § 971.207. The applicant is encouraged to consult with affected States as early as is practicable [see also §§ 971.213 and 971.606(b)].

(h) *Compliance with Federal consistency requirements.* An applicant for a commercial recovery permit must comply with all necessary requirements, including procedures, pursuant to 15 CFR Part 930, Subpart D. Applications and other necessary data and information must be transmitted to the designated State agency as prescribed under 15 CFR 930.50.

Contents

§ 971.201 Statement of financial resources.

(a) *General.* The application must contain information sufficient to demonstrate to the Administrator pursuant to § 971.301 that, upon issuance or transfer of the permit, the applicant will have access to the financial resources to carry out, in accordance with this part, the commercial recovery program set forth in the applicant's commercial recovery plan.

(b) *Specific.* In particular, the information on financial resources is expected to be general in nature but must include the likely sources and timing of funds to meet the applicant's scheduled expenditures in the recovery plan. These sources may include cash flow, reserves, and outside funding.

§ 971.202 Statement of technological experience and capabilities.

(a) *General.* The application must contain information sufficient to demonstrate to the Administrator pursuant to § 971.301 that, upon issuance or transfer of the permit, the applicant will have the technological capability to carry out, in accordance with the regulations contained in this part, the commercial recovery program set out in the applicant's commercial recovery plan.

(b) *Specific.* In particular, the information submitted pursuant to this section must describe the equipment, knowledge, and skills the applicant possesses, or to which it can demonstrate access [see § 971.200(e)]. The information must include:

(1) A description of the technology or the equipment and methods to be used by the applicant in carrying out each step in the mining process, including nodule collection, retrieval, transfer to ship, environmental monitoring, transport to processing facilities, nodule processing, waste disposal and compliance with applicable water quality standards. The description must include:

(i) An analysis of the performance of experimental systems, sub-systems, or analogous machinery;

(ii) The rationale for extrapolating from test results to commercial mining. The more test data offered with the application the less analysis will be expected; and

(iii) Anticipated system reliability within the context of anticipated production time lost through equipment failure.

(2) A functional description of the types of technical persons on whom the applicant will rely to operate its equipment.

§ 971.203 Commercial recovery plan.

(a) *General.* The application must include a proposed commercial recovery plan which describes the applicant's projected commercial recovery activities, in a general way, for the twenty year period to be covered by the proposed permit. Although preliminary and subject to change, the plan must be more detailed for that portion of the permit term leading up to the initiation of commercial recovery. The plan must include sufficient information for the Administrator, pursuant to this part, to make the necessary determinations pertaining to the certification and issuance or transfer of a permit and to the development and enforcement of the TCRs for a permit.

(b) *Specific.* The plan must include:

(1) A description of the activities proposed to be carried out during the period of the permit;

(2) The intended schedule of commercial recovery (see "Diligent commercial recovery," § 971.503);

(3) Environmental safeguards and monitoring systems, which must take into account requirements under Subpart F of this part, including best available technologies (BAT) (§ 971.604) and monitoring (§ 971.603);

(4) Details of the area or areas proposed for commercial recovery, which meet requirements for diligence (§ 971.503) and conservation of resources pursuant to Subpart E (especially § 971.502);

(5) A resource assessment of the area or areas proposed for commercial recovery which meets the requirements for resource assessment and logical mining unit (§ 971.501);

(6) A description of the methods and technology to be used for commercial recovery and processing (see § 971.202(b)(1)); and

(7) The methods to be used for disposal of wastes from recovery and processing, including the areas for disposal and identification of any toxic substances in wastes.

§ 971.204 Environmental and use conflict analysis.

(a) *Environmental information submission.* The application must be supported by sufficient marine environmental information for the Administrator to prepare an environmental impact statement (EIS) on the proposed mining activities, and to determine the appropriate permit TCRs based on environmental characteristics of the requested minesite. The Administrator may require the submission of additional data, in the event he determines that the basis for a suitable EIS, or a determination of appropriate TCRs, is not available.

(b)(1) In preparing the EIS, the Administrator will attempt to characterize the environment in such a way as to provide a basis for judging the potential for significant adverse effects or irreparable harm triggered by commercial mining (see Subpart F). In compiling these data, the Administrator will utilize existing information including the relevant license EIS, additional exploration data acquired by the applicant, and other data in the public domain.

(2) The EIS must present adequate physical, chemical, and biological information for the permit area. If the permit area lies within the area of NOAA's Deep Ocean Mining Environmental Study (DOMES), the parameters listed in NOAA's Technical Guidance Document pertaining to the upper and lower water column should be included. Specifically, these parameters include:

(i) Upper water column—

Nutrients
Endangered species
Salinity, temperature, density
Currents.

(ii) Lower water column and seafloor—

Currents
Suspended particulate matter dispersion
Sediment characteristics (mineralogy, particle size, shape and density, and water content)
Topography
Benthos.

(3) For a permit area outside the DOMES area, the applicant is encouraged to consult with NOAA at the earliest opportunity in order to determine the specific parameters to be measured based on the location and specific environmental characteristics of the permit area. The Administrator, in consultation with the Administrator of the Environmental Protection Agency and with the assistance of other appropriate Federal agencies, may determine that a programmatic EIS is required for any new area.

(c) The application must include a monitoring plan for test mining and at-sea commercial recovery activities which meets the objectives and requirements of § 971.603.

(d) *Use conflict analysis.* The application must include information known to the applicant on other uses of the proposed mining area to support the Administrator's determination regarding potential use conflicts between commercial mining activities and those activities of other nations or of other U.S. citizens.

(e) *Onshore information.* Because of NEPA requirements, the Administrator must include in the EIS on the proposed permit the complete spectrum of activities resulting from the issuance of a permit. Therefore, onshore information including the location and operation of nodule processing facilities must be submitted with the application in accordance with the details in § 971.606.

§ 971.205 Vessel safety and documentation.

In order to provide a basis for the necessary determinations with respect to the safety of life and property at sea, pursuant to § 971.407, § 971.422 and Subpart G of this part, the application must contain the following information for vessels used in commercial recovery, except for those vessels under 300 gross tons which are engaged in oceanographic research:

(a) *U.S. flag vessel.* All mining ships and at least one of the transport ships used by each permittee must be documented under the laws of the United States. To the extent that the applicant knows which United States flag vessels it will use, it must include with its application copies of the vessels' current valid Coast Guard Certificates of Inspection.

(b) *Foreign flag vessels.* To the extent that the applicant knows which foreign flag vessel(s) it will be using for other purposes, the application must include evidence of the following:

(1) That any foreign flag vessel whose flag state is party to the International Convention for the Safety of Life at Sea, 1974 (SOLAS 74) possesses current valid SOLAS 74 certificates;

(2) That any foreign flag vessel whose flag state is not party to SOLAS 74 but is party to the International Convention for the Safety of Life at Sea, 1960 (SOLAS 60) possesses current valid SOLAS 60 certificates; and

(3) That any foreign flag vessel whose flag state is not a party to either SOLAS 74 or SOLAS 60 meets all applicable structural and safety requirements contained in the published rules of a member of the International Association of Classification Societies (IACS).

(c) *Supplemental certificates.* If the applicant does not know at the time of submitting an application which vessels it will be using, it must submit the applicable certification for each vessel before the cruise on which it will be used.

§ 971.206 Statement of ownership.

(a) *General.* The application must include sufficient information to demonstrate that the applicant is a United States citizen.

(b) *Specific.* In particular, the application must include:

(1) Name, address, and telephone number of the United States citizen responsible for commercial recovery operations;

(2) A description of the citizen or citizens engaging in commercial recovery, including:

(i) Whether the citizen is a natural person, partnership, corporation, joint venture, or other form of association;

(ii) The state of incorporation or state in which the partnership or other business entity is registered;

(iii) The name and place of business of the registered agent or equivalent representative to whom notices and orders are to be delivered;

(iv) Copies of all essential and nonproprietary provisions in articles of incorporation, charter or articles of association; and

(v) The name of each member of the association, partnership, or joint venture, including information about the participation and/or ownership of stock of each partner or joint venturer.

§ 971.207 Antitrust information.

In order to support the antitrust review referenced in § 971.211, the application must contain information sufficient, in the applicant's view and based on preapplication consultations pursuant to § 971.200(g), to identify the applicant and describe any significant existing market share it has with respect to the mining or marketing of the metals proposed to be recovered under the permit.

§ 971.208 Fee.

(a) *General.* Section 104 of the Act provides that no application for the issuance or transfer of a permit will be certified unless the applicant pays to NOAA an administrative fee which reflects the reasonable administrative costs incurred in reviewing and processing the application.

(b) *Amount.* A fee payment of $100,000, payable to the National Oceanic and Atmospheric Administration, Department of Commerce, must accompany each application. If the administrative costs of reviewing and processing the application are significantly less than or in excess of $100,000, the Administrator, after determining the amount of the under- or over-charge, as applicable, will refund the difference or require the applicant to pay the additional amount before issuance or transfer of the permit. In the case of an application for transfer of a permit to, or for a significant change to a permit held by, an entity which has previously been found qualified for a permit, the Administrator may reduce the fee in advance by an appropriate amount which reflects costs avoided by reliance on previous findings made in relation to the proposed transferee.

§ 971.209 Processing outside the United States.

(a) Except as provided in this section and § 971.408, the processing of hard minerals recovered pursuant to a permit shall be conducted within the U.S., provided that the President or his designee does not determine that this restriction contravenes the overriding national interests of the United States.

(b) If foreign processing is proposed, the applicant shall submit a justification demonstrating the basis for a finding pursuant to § 971.408(a)(1). The justification shall include an analysis of each factor which the applicant considers essential to its conclusion that processing at a site within the U.S. is not economically viable.

(c) If the Administrator determines that the justification provided by the applicant is insufficient, or if the Administrator receives during the public comment or hearing period what the Administrator determines to be a serious alternative U.S. processing site proposal, the Administrator may require the applicant to supply, within a specified reasonable time, additional information relevant to the § 971.408(a)(1) finding.

(d) The applicant must include in its application satisfactory assurances that such resources after processing, to the extent of the permittee's ownership therein, will be returned to the United States for domestic use if the Administrator determines pursuant to § 971.408 that the national interest necessitates such return. Assurances must include proposed arrangements with the host country.

PROCEDURES

§ 971.210 Determination whether application is complete for further processing.

Upon receipt of an application, the Administrator will review it to determine whether it includes information specifically identifiable with and fully responsive to each requirement in § 971.201 through § 971.209. The Administrator will notify the applicant whether the application is complete within 60 days after it is received. The notice will identify, if applicable, in what respects the application is not complete, and will specify the information which the applicant must submit in order to make it complete, why the additional information is necessary, and a reasonable date by which the application must be completed. Application processing will not begin until the Administrator determines that the application is complete.

§ 971.211 Consultation and cooperation with Federal agencies.

(a) Promptly after receipt of an application that the Administrator has determined pursuant to § 971.210 is complete, the Administrator will distribute a copy of the application to every Federal agency or department which, pursuant to section 103(e) of the Act, has identified programs or activities within its statutory responsibilities which would be affected by the activities proposed in the application (e.g., the Departments of State, Transportation, Justice, Interior, Defense, Treasury and Labor, as well as the Environmental Protection Agency, Federal Trade Commission, International Trade Administration and National Science Foundation). Based on its legal responsibilities and authorities, each such agency or department may, not later than 60 days after it receives a copy of the application, recommend certification of the application, issuance or transfer of the permit, or denial of such certification, issuance or transfer. The advice or recommendation by the Attorney General or Federal Trade Commission on antitrust review, pursuant to section 103(d) of the Act, must be submitted within 90 days after their receipt of a copy of the application.

(b) NOAA will use this process of consultation and cooperation to facilitate necessary Federal decisions on proposed commercial recovery activities, pursuant to the mandate of section 103(e) of the Act to reduce the number of separate actions required to satisfy Federal agencies' statutory responsibilities. The Administrator will not issue or transfer the permit during the 90 day period after receipt by the Attorney General and the Federal Trade Commission except upon written confirmation of the Attorney General and the Federal Trade Commission that neither intends to submit further comments or recommendations with respect to the application.

(c) In any case in which a Federal agency or department recommends a denial, it must set forth in detail the manner in which the application does not comply with any law or regulation within its area of responsibility and how the application may be amended, or how TCRs might be added to the permit, to assure compliance with such law or regulation.

(d) NOAA will cooperate with such agencies and with the applicant with the goal of resolving any concerns raised and satisfying the statutory responsibilities of these agencies.

(e) If the Administrator decides to issue or transfer a permit with respect to which denial of the issuance or transfer has been recommended by the Attorney General or the Federal Trade Commission, or to issue or transfer a permit without imposing TCRs recommended by the Attorney General or the Federal Trade Commission, as appropriate, the Administrator will, before or at issuance or transfer of the permit, notify the Attorney General and the Federal Trade Commission of the reasons for his decision.

§ 971.212 Public notice, hearing and comment.

(a) *Notice and comments.* The Administrator will publish in the FEDERAL REGISTER, for each complete application for issuance or transfer of a commercial recovery permit, notice that the application has been received. Subject to § 971.802, interested persons will be allowed to examine the materials relevant to the application, and will have at least 60 days after publication of notice to submit written comments to the Administrator.

(b) *Hearings.* After preparation of the draft environmental impact statement (EIS) on an application, the Administrator will hold a public hearing on the application and the draft EIS in an appropriate location and may employ additional methods he/she deems appropriate to inform interested persons about each application and to invite comments thereon. A hearing will be conducted in any State in which a processing plant or any of its ancillary facilities (such as a marine terminal or a waste disposal facility) are proposed to be located.

(c) If the Administrator determines there exist one or more specific and material factual issues which require resolution by formal processes, at least one formal hearing will be held in the District of Columbia metropolitan area in accordance with the provisions of Subpart I of this part. The record developed in any such formal hearing will be part of the basis of the Administrator's decisions on an application.

(d) Hearings held pursuant to this section and other procedures will be consolidated, if practicable, with hearings held and procedures employed by other Federal and State agencies.

§ 971.213 Amendment to an application.

After an application has been submitted to the Administrator, but before a determination is made on the issuance or transfer of a permit, the applicant must submit an amendment to the application if there is a significant change in the circumstances represented in the original application which affects the requirements of this subpart. Applicants should consult with NOAA to determine if changes in circumstances are sufficiently significant to require submission of an amendment. The application, as amended, would then serve as the basis for determinations by the Administrator under this part. For each amendment judged by the Administrator to be significant, the Administrator will provide a copy of that amendment to each other Federal agency and department which received a copy of the original application, and also will provide for public notice, hearing and comment on the amendment pursuant to § 971.212. After the issuance or transfer of a permit, any revision of the permit will be made pursuant to § 971.413. Any amendment or modification which would cause coastal zone effects substantially different than those originally reviewed by the state agency would be subject to Federal consistency review as prescribed in 15 CFR Part 930.

§ 971.214 Consolidated license and permit procedures. [Reserved]

Subpart C—Certification of Applications

§ 971.300 General.

(a) Certification is an intermediate step between receipt of an application for issuance or transfer of a permit and actual issuance or transfer. It is a determination which focuses on the eligibility of the applicant.

(b) Before the Administrator may certify an application for issuance or transfer of a permit, the Administrator must determine that issuance of the permit would not violate any of the restrictions in § 971.103(b). The Administrator also must make written determinations with respect to the requirements with respect to the requirements set forth in § 971.301.

(c) To the maximum extent possible, the Administrator will endeavor to complete certification within 100 days after receipt of a complete application. If final certification or denial of certification has not occurred within 100 days after receipt of the application, the Administrator will inform the applicant in writing of the pending unresolved issues, the efforts to resolve them, and an estimate of the time required to do so.

§ 971.301 Required findings.

Before the Administrator may certify an application for a commercial recovery permit, the Administrator must:

(a) Approve the size and location of the commercial recovery area selected by the applicant, and this approval will occur unless the Administrator determines that (1) the area is not a logical mining unit under § 971.501, or (2) commercial recovery activities in the proposed area would result in a significant adverse environmental effect which cannot be avoided by imposition of reasonable restrictions; and

(b) Find that the applicant—

(1) Has demonstrated that, upon issuance or transfer of the permit, the applicant will be financially responsible to meet all obligations which may be required to engage in its proposed commercial recovery activities;

(2) Has demonstrated that, upon permit issuance or transfer, it will possess, or have access to, the technological capability to engage in the proposed commercial recovery;

(3) Has satisfactorily fulfilled all past obligations under any license or permit previously issued or transferred to the applicant under the Act;

(4) Has a commercial recovery plan which meets the requirements of § 971.203; and

(5) Has paid the permit fee specified in § 971.208.

§ 971.302 Denial of certification.

(a) The Administrator may deny certification of an application if the Administrator finds that the requirements of this subpart, or the requirements for issuance or transfer under § 971.403 through § 971.408, have not been met.

(b) When the Administrator proposes to deny certification the Administrator will send to the applicant, via certified mail, return receipt requested, and publish in the FEDERAL REGISTER, written notice of intention to deny certification. The notice will include:

(1) The basis upon which the Administrator proposes to deny certification; and

(2) If the basis for the proposed denial is a deficiency which the Administrator believes the applicant can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (not to exceed 180 days except as specified by the Administrator for good cause).

(c) The Administrator will deny certification:

(1) On the 30th day after the date the notice is received by the applicant, under paragraph (b) of the section, unless before the 30th day the applicant files with the Administrator a written request for an administrative review of the proposed denial; or

(2) On the last day of the period established under paragraph (b)(2)(ii) in which the applicant must correct a deficiency, if that deficiency has not been corrected before that day and an administrative review requested pursuant to paragraph (c)(1) is not pending or in progress.

(d) If a timely request for administrative review of the proposed denial is made by the applicant under paragraph (c)(1) of this section, the Administrator will promptly begin a formal hearing. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempts to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(e) If the Administrator denies certification, he will send to the applicant written notice of the denial, including the reasons therefor.

(f) Any final determination by the Administrator granting or denying certification is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

§ 971.303 Notice of certification.

Upon making a final determination to certify an application for a commercial recovery permit, the Administrator will promptly send written notice of the determination to the applicant.

Subpart D—Issuance/Transfer: Terms, Conditions and Restrictions

§ 971.400 General.

(a) *Proposal.* After certification of an application pursuant to Subpart C of this part, the Administrator will proceed with a proposal to issue or transfer a permit for the commercial recovery activities described in the application.

(b) *Terms conditions and restrictions.* (1) Within 180 days after certification (or such longer period as the Administrator may establish for good cause shown in writing), the Administrator will propose terms and conditions for, and restrictions on, the proposed commercial recovery which are consistent with the provisions of the Act and this part as set forth in § 971.418 through § 971.430. Proposed and final TCRs will be uniform in all permits, except to the extent that differing physical and environmental conditions and/or mining methods require the establishment of special TCRs for the conservation of natural resources, protection of the environment, or the safety of life and property at sea. The Administrator will propose TCRs in writing to the applicant, and public notice thereof will be provided pursuant to § 971.401. The proposed TCRs will be included with the draft of the EIS on permit issuance.

(2) If the Administrator does not propose TCRs within 180 days after certification, the Administrator will notify the applicant in writing of the reasons for delay and of the approximate date on which the proposed TCRs will be completed.

(c) *Findings.* Before issuing or transferring a commercial recovery permit, the Administrator must make written findings in accordance with the requirements of § 971.403 through § 971.408. These findings will be made after considering all information submitted with respect to the application and proposed issuance or transfer. The Administrator will make a final determination of issuance or transfer of a permit, and will publish a final EIS on that action, within 180 days (or such longer period of time as the Administrator may establish for good cause shown in writing) following the date on which proposed TCRs and the draft EIS are published.

ISSUANCE/TRANSFER, MODIFICATION/REVISION; SUSPENSION/REVOCATION

§ 971.401 Proposal to issue or transfer and proposed terms, conditions and restrictions.

(a) *Notice and comment.* The Administrator will publish in the FEDERAL REGISTER notice of each proposal to issue or transfer, including notice of a draft EIS, and of proposed terms and conditions for, and restrictions on, a commercial recovery permit that will be included with the draft EIS [see § 971.400(b)]. Subject to § 971.802, interested persons will be permitted to examine the materials relevant to such proposals. Interested persons and affected States will have at least 60 days after publication of such notice to submit written comments to the Administrator.

(b) *Hearings.* (1) The Administrator will hold the public hearing(s) required by § 971.212(b) in an appropriate location and may employ such additional methods as he deems appropriate to inform interested persons about each proposal and to invite their comments thereon. A copy of the notice and draft EIS will be provided to the affected State agency. Information provided by NOAA may be used to supplement information provided by the applicant, however it will not affect schedules for State agency review and decisions with respect to consistency determinations as required in 15 CFR Part 930, Subpart D.

(2) If the Administrator determines there exist one or more specific and material factual issues which require resolution by formal processes, at least one formal hearing, which may be consolidated with a hearing held by another agency, will be held in the District of Columbia metropolitan area in accordance with the provisions of Subpart I of this part. The record developed in any such formal hearing will be part of the basis for the Administrator's decisions on issuance or transfer of, and on TCRs for, the permit.

§ 971.402 Consultation and cooperation with Federal and State agencies.

Before issuance or transfer of a commercial recovery permit, the Administrator will conclude any consultations in cooperation with other Federal and State agencies which were initiated pursuant to §§ 971.211 and 971.200(g). These consultations will be held to assure compliance with, as applicable and among other statutes, the Endangered Species Act of 1973, as amended, the Marine Mammal Protection Act of 1972, as amended, the Fish and Wildlife Coordination Act, and the Coastal Zone Management Act of 1972, as amended. The Administrator also will consult, before any issuance, transfer, modification or renewal of a permit, with any affected Regional Fishery Management Council established pursuant to section 302 of the Magnuson Fishery Conservation and Management Act of 1976 (16 U.S.C. 1852) if the activities undertaken pursuant to the permit could adversely affect any fishery within the Fishery Conservation Zone (now known as the Exclusive Economic Zone), or any anadromous species or Continental Shelf fishery resource subject to the exclusive management authority of the United States beyond that zone.

§ 971.403 Freedom of the high seas.

(a) Before issuing or transferring a commercial recovery permit, the Administrator must find the recovery proposed in the application will not unreasonably interfere with the exercise of the freedoms of the high seas by other nations, as recognized under general principles of international law.

(b) In making this finding, the Administrator will recognize that commercial recovery of hard mineral resources of the deep seabed is a freedom of the high seas. In the exercise of this right, each permittee shall act with reasonable regard for the interests of other nations in their exercise of the freedoms of the high seas.

(c)(1) In the event of a conflict between the commercial recovery program of an applicant or permittee and a competing use of the high seas by another nation or its nationals, the Administrator, in consultation and cooperation with the Department of State and other interested agencies, will enter into negotiations with that nation to resolve the conflict. To the maximum extent possible the Administrator will endeavor to resolve the conflict in a manner that will allow both uses to take place such that neither will unreasonably interfere with the other.

(2) If both uses cannot be conducted harmoniously in the area subject to the recovery plan, the Administrator will decide whether to issue or transfer the permit.

§ 971.404 International obligations of the United States.

Before issuing or transferring a commercial recovery permit, the Administrator must find that the commercial recovery proposed in the application will not conflict with any international obligation of the United States established by any treaty or international convention in force with respect to the United States.

§ 971.405 Breach of international peace and security involving armed conflict.

Before issuing or transferring a commercial recovery permit, the Administrator must find that the recovery proposed in the application will not create a situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict.

§ 971.406 Environmental effects.

Before issuing or transferring a commercial recovery permit, the Administrator must find that the commercial recovery proposed in the application cannot reasonably be expected to result in a significant adverse environmental effect, taking into account the analyses and information in any applicable EIS and any TCRs associated with the permit. This finding also will be based upon the requirements in Subpart F. However, as also noted in Subpart F, if a determination on this question cannot be made on the basis of available information, and it is found that irreparable harm will not occur during a period when an approved monitoring program is undertaken to further examine the significant adverse environmental effect issue, a permit may be granted, subject to modification or suspension and, if necessary and appropriate, revocation pursuant to § 971.417(a), or subject to emergency suspension pursuant to § 971.417(h).

§ 971.407 Safety at sea.

Before issuing or transferring a commercial recovery permit, the Administrator must find that the commercial recovery proposed in the application will not pose an inordiante threat to the safety of life and property at sea. This finding will be based on the requirements in § 971.205 and Subpart G.

§ 971.408 Processing outside the United States.

(a) Before issuing or transferring a commercial recovery permit which authorizes processing outside the U.S., the Administrator must find, after the opportunity for an agency hearing required by § 971.212(b), that:

(1) The processing of the quantity concerned of hard mineral resource at a place other than within the United States is necessary for the economic viability of the commercial recovery activities of the permittee; and

(2) Satisfactory assurances have been given by the permittee that such resources, after processing, to the extent of the permittee's ownership therein, will be returned to the United States for domestic use, if the Administrator so requires after determining that the national interest necessitates such return.

(b) At or after permit issuance the Administrator may determine, or revise a prior determination, that the national interest necessitates return to the U.S. of a specified amount of hard mineral resource recovered pursuant to the permit and authorized to be processed outside the United States. Considerations in making this determination may include:

(1) The national interest in an adequate supply of minerals;

(2) The foreign policy interests of the United States; and

(3) The multi-national character of deep seabed mining operations.

(c) As appropriate, TCRs will incorporate provisions to implement the decision of the Administrator made pursuant to this section.

(d) Environmental considerations of the proposed activity will be addressed in accordance with § 971.606(c).

§ 971.409 Denial of issuance or transfer.

(a) The Administrator may deny issuance or transfer of a permit if he finds that the applicant or the proposed commercial recovery activities do not meet the rquirements of this part for the issuance or transfer of a permit.

(b) When the Administrator proposes to deny issuance or transfer, he will send to the applicant, via certified mail, return receipt requested, and publish in the FEDERAL REGISTER, written notice of his intention to deny issuance or transfer. The notice will include:

(1) The basis upon which the Administrator proposes to deny issuance or transfer; and

(2) If the basis for the proposed denial is a deficiency which the Administrator believes the applicant can correct:

(i) The action believed necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (not to exceed 180 days except as specified by the Administrator for good cause).

(c) The Administrator will deny issuance or transfer:

(1) On the 30th day after the date the notice is received by the applicant under paragraph (b) of this section, unless before the 30th day the applicant files with the Administrator a written request for an administrative review of the proposed denial; or

(2) On the last day of the period established under paragraph (b)(2)(ii) in which the applicant must correct a deficiency, if the deficiency has not been corrected before that day and an administrative review requested pursuant to paragraph (c)(1) is not pending or in progress.

(d) If a timely request for administrative review of the proposed denial is made by the applicant under paragraph (c)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with Subpart I. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempt to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(e) If the Administrator denies issuance or transfer, the Administrator will send to the applicant written notice of final denial, including the reasons therefor.

(f) Any final determination by the Administrator granting or denying issuance or transfer of a permit is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

§ 971.410 Notice of issuance or transfer.

If the Administrator finds that the requirements of this subpart have been met, he will issue or transfer the permit along with the appropriate TCRs. Notice of issuance or transfer will be made in writing to the applicant and published in the FEDERAL REGISTER.

§ 971.411 Objections to terms, conditions and restrictions.

(a) The permittee may file a notice of objection to any TCR in the permit. The permittee may object on the grounds that any TCR is inconsistent with the Act or this part, or on any other grounds which may be raised under applicable provisions of law. If the permittee does not file notice of an objection within the 60-day period immediately following the permittee's reciept of the notice of issuance or transfer under § 971.410, the permittee will be deemed conclusively to have accepted the TCRs in the permit.

(b) Any notice of objection filed under paragraph (a) of this section must be in writing, must indicate the legal or factual basis for the objection, and must provide information relevant to any underlying factual issues deemed by the permittee as necessary to the Administrator's decision upon the objection.

(c) Within 90 days after receipt of the notice of objection, the Administrator will act on the objection and publish in the FEDERAL REGISTER, as well as provide to the permittee, written notice of the decision.

(d) If, after the Administrator takes final action on an objection, the permittee demonstrates that a dispute remains on a material issue of fact, the Administrator will provide for a formal hearing which will proceed in accordance with Subpart I of this part.

(e) Any final determination by the Administrator on an objection to TCRs in a permit, after the formal hearing provided in paragraph (d), is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

§ 971.412 Changes in permits and permit terms, conditions, and restrictions.

(a) During the duration of a commercial recovery permit, changes in the permit or its associated commercial recovery plan may be initiated by either the permittee or the Administrator.

(b) A significant change is one which, if approved, would result in:

(1) An increase of more than five percent in the size of the commercial recovery area; or

(2) A change in the location of five percent or more of the commercial recovery area.

(c) A major change is one affecting one or more of:

(1) The bases for certifying the original application pursuant to § 971.301;

(2) The bases for issuing or transferring the permit pursuant to § 971.403 through § 971.408;

(3) The TCRs issued as part of the permit pursuant to § 971.418 through § 971.430; or

(4) The ownership of a permittee (or the membership of the joint venture, partnership or other entity on whose behalf the permit was issued); and which change is sufficiently broad in scope to raise a question as to:

(i) The permittee's ability to meet the requirements of the sections cited in paragraphs (c)(1) and (2) of this section;

(ii) The sufficiency of the TCRs to accomplish their intended purpose; or

(iii) The antitrust characteristic of the permittee.

(d) A minor change is one that is clearly more modest in scope than the changes described in paragraph (b) or (c) of this section.

(e) A permittee may not implement a significant or major change, as defined in paragraphs (b) and (c) of this section, until an application for revision of the permit or its associated commercial recovery plan has been approved by the Administrator. However, advance notice of proposed major changes in a permittee's corporate membership or legal structure is not required, unless practicable, but the Administrator expects prompt notification of the occurrence of such a major change.

(f) A proposed significant or major change, as defined in paragraphs (b) and (c) of this section, may trigger the need for additional review, under the Federal consistency provisions of the Coastal Zone Management Act of 1972, as amended.

§ 971.413 Revision of a permit.

(a) During the term of a commercial recovery permit, the permittee may submit to the Administrator an application for a revision of the permit or the commercial recovery plan associated with it to accommodate changes desired by the permittee. In some cases it may be advisable to recognize at the time of filing the original permit application that, although the essential information for issuing or transferring a permit as specified in § 971.201 through § 971.209 must be included in such application, some details may have to be provided in the future in the form of a revision. In such instances, the Administrator may issue or transfer a permit which would authorize commercial recovery activities and plans only to the extent described in the application.

(b) An application by a permittee for a revision of a permit or its associated commercial recovery plan involving a significant change, as defined in § 971.412(b), must be followed by the full application procedures in this part, including a public hearing.

(c) An application by a permittee for a revision of a permit or its associated commercial recovery plan involving a major change, as defined in § 971.412(c) (See also § 971.425 of this part), will be acted on after notice thereof is published by the Administrator in the FEDERAL REGISTER with a 60-day opportunity for public comment and consultation with appropriate Federal agencies.

(d)(1) The Administrator will approve a revision if the Administrator finds in writing that the revision will comply with the requirements of the Act and this part.

(2) Notice of the Administrator's decision on the proposed revision will be provided to the permittee in writing and published in the FEDERAL REGISTER.

(e) A permittee may notify the Administrator of minor changes, as defined in § 971.412(d), subsequently in the annual report (See § 971.801 of this part).

(f) If the relative importance of the change is unclear to the permittee, the Administrator should be notified in advance so that the Administrator can decide whether a revision in accordance with § 971.412(e) is required.

§ 971.414 Modification of permit terms, conditions, and restrictions.

(a) After issuance or transfer of any permit, the Administrator, after consultation with appropriate Federal agencies and the permittee, may modify the TCRs in a permit for the following purposes:

(1) To avoid unreasonable interference with the interests of other nations in their exercise of the freedoms of the high seas, as recognized under general principles of international law. This determination will take into account the considerations listed in § 971.403;

(2) If relevant data and information (including, but not limited to, data resulting from activities under a permit) indicate that modification is required to protect the quality of the environment or to promote the safety of life and property at sea;

(3) To avoid a conflict with any international obligation of the United States, established by any treaty or convention in force with respect to the United States, as determined in writing by the President; or

(4) To avoid any situation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict, as determined in writing by the President.

(b) A proposal by the Administrator to modify the TCRs in a permit is significant and must be followed by the full application procedures in this part, including a public hearing, if it would result in either of the changes identified in § 971.412(b).

(c) All proposed modifications other than those described in paragraph (b) of this section will be acted on after the Administrator provides:

(1) Written notice of the proposal to the permittee; and

(2) Publication of this proposal in the FEDERAL REGISTER with a 60-day opportunity for comment.

(d)(1) The Administrator will effect a modification of the TCRs if the Administrator finds in writing that the proposed modification will comply with the requirements of the Act and this part.

(2) Upon adopting a TCR modification, the Administrator shall issue to the permittee an amended permit including the modified TCRs, and shall publish notice of issuance in the FEDERAL REGISTER.

(3) The procedures for objection to modification of the TCRs are the same as those for objection to a TCR under § 971.411 of this part.

§ 971.415 Duration of a permit.

(a) Unless suspended or revoked pursuant to §§ 971.406 and 971.417, each commercial recovery permit will be issued for a period of 20 years and for so long thereafter as hard mineral resources are recovered annually in commercial quantities from the area listed in the permit.

(b) If the permittee has substantially complied with the permit and its associated recovery plan and requests an extension of the permit, the Administrator will extend the permit with appropriate TCRs, consistent with the Act, for so long thereafter as hard mineral resources are recovered annually in commercial quantities from the area to which the recovery plan associated with the permit applies. The Administrator may make allowance for deviation from the recovery plan for good cause, such as significantly changed market conditions. However, a request for extension must be accompanied by an amended recovery plan to govern the activities by the permittee during the extended period.

(c) Successive extensions may be requested, and will be granted by the Administrator, based on the criteria specified in paragraphs (a) and (b).

§ 971.416 Approval of permit transfers.

(a) The Administrator may transfer a permit after a written request by the permittee. After a permittee submits a transfer request tc the Administrator, the proposed transferee will be deemed an applicant for a commercial recovery permit, and will be subject to the requirements and procedures of this part.

(b) The Administrator will transfer a permit if the proposed transferee is a United States citizen and proposed commercial recovery activities meet the requirements of the Act and this part, and if the proposed transfer is in the public interest. The Administrator will presume that the transfer is in the public interest if it meets the requirements of the Act and this part. In case of mere change in the form or ownership of a permittee, the Administrator may waive relevant determinations for requirements for which no changes have occurred since the preceding application.

§ 971.417 Suspension or modification of activities; suspension or revocation of permits.

(a) The Administrator may:

(1) In addition to, or in lieu of, the imposition of any civil penalty under Subpart J of this part, or in addition to the imposition of any fine under Subpart J, suspend or revoke any permit issued under this part, or suspend or modify any particular activities under such a permit, if the permittee substantially fails to comply with any provision of the Act, this part, or any term, condition or restriction of the permit; and

(2) Suspend or modify particular activities under any permit, if the President determines that such suspension or modification is necessary:

(i) To avoid any conflict with any international obligation of the United States established by any treaty or convention in force with respect to the United States; or

(ii) To avoid any situtation which may reasonably be expected to lead to a breach of international peace and security involving armed conflict.

(b) Any action taken by the Administrator in accordance with paragraph (a)(1) will proceed pursuant to the procedures in § 971.1003. Any action taken in accordance with paragraph (a)(2) will proceed pursuant to paragraphs (c) through (i) of this section, other than paragraph (h)(2).

(c) Prior to taking any action specified in paragraph (a)(2) the Administrator will publish in the FEDERAL REGISTER, and send to the permittee, written notice of the proposed action. The notice will include:

(1) The basis of the proposed action; and

(2) If the basis for the proposed action is a deficiency which the Administrator believes the permittee can correct:

(i) The action necessary to correct the deficiency; and

(ii) The time within which any correctable deficiency must be corrected (not to exceed 180 days except as specified by the Administrator for good cause).

(d) The Administrator will take the proposed action:

(1) On the 30th day after the date notice is sent to the permittee, under paragraph (c) of this section, unless before the 30th day the permittee files with the Administrator a written re-

quest for an administrative review of the proposed action; or

(2) On the last day of the period established under paragraph (c)(2)(ii) in which the permittee must correct the deficiency, if such deficiency has not been corrected before that day and an administrative review requested pursuant to paragraph (d)(1) is not pending or in progress.

(e) If a timely request for administrative review of the proposed denial is made by the permittee under paragraph (d)(1) of this section, the Administrator will promptly begin a formal hearing in accordance with Subpart I of this part. If the proposed denial is the result of a correctable deficiency, the administrative review will proceed concurrently with any attempt to correct the deficiency, unless the parties agree otherwise or the administrative law judge orders differently.

(f) The Administrator will serve on the permittee, and publish in the FEDERAL REGISTER, written notice of the action taken including the reasons therefor.

(g) Any final determination by the Administrator to take the proposed action is subject to judicial review as provided in Chapter 7 of Title 5, United States Code.

(h) The issuance of any notice of proposed action under this section will not affect the continuation of commercial recovery activities by a permittee. The provisions of paragraphs (c), (d), (e) and the first sentence of this paragraph (h) of this section will not apply when:

(1) The President determines by Executive Order that an immediate suspension or modification of particular activities under that permit, is necessary for the reasons set forth in paragraph (a)(2); or

(2) The Administrator determines that immediate suspension of such a permit or immediate suspension or modification of particular activities under a permit, is necessary to prevent a significant adverse environmental effect or to preserve the safety of life or property at sea, and the Administrator issues an emergency order in accordance with § 971.1003(d)(4).

(i) The Administrator will immediately rescind the suspension order as soon as he has determined that the cause for suspension has been removed.

TERMS, CONDITIONS AND RESTRICTIONS

§ 971.418 Diligence requirements.

The TCRs in each commercial recovery permit must include provisions to assure diligent development consistent with § 971.503, including a requirement that recovery at commercial scale be underway within ten years from the date of permit issuance unless that deadline is extended by the Administrator for good cause.

§ 971.419 Environmental protection requirements.

(a) Each commercial recovery permit must contain TCRs established by the Administrator pursuant to Subpart F which prescribe actions the permittee must take in the conduct of commercial recovery activities to assure protection of the environment. Factors to be taken into account regarding the potential for significant adverse environmental effects are discussed in §§ 971.601 and 971.602.

(b) Before establishing the TCRs pertaining to environmental protection, the Administrator will consult with the Administrator of the Environmental Protection Agency, the Secretary of State and the Secretary of the department in which the Coast Guard is operating. The Administrator also will take into account and give due consideration to formal comments received from the public, including those from the State agency, and to the information contained in the final site-specific EIS prepared with respect to the proposed permit.

§ 971.420 Resource conservation requirements.

For the purpose of conservation of natural resources, each permit issued under this part will contain, as needed, TCRs which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the hard mineral resources in the recovery area. The Administrator will establish these requirements pursuant to § 971.502.

§ 971.421 Freedom of the high seas requirements.

Each permit issued under this part must include appropriate restrictions to ensure that commercial recovery activities do not unreasonably interfere with the interests of other nations in their exercise of the freedoms of the high seas, as recognized under general principles of international law. The Administrator will consider the factors in § 971.403 in establishing these restrictions.

§ 971.422 Safety at sea requirements.

The Secretary of the department in which the Coast Guard is operating, in consultation with the Administrator, will require in any permit issued under this part, in conformity with principles of international law, that vessels documented under the laws of the United States and used in activities authorized under the permit comply with conditions regarding design, construction, alteration, repair, equipment, operation, manning and maintenance relating to vessel and crew safety and the promotion of safety of life and property at sea. These requirements will be established with reference to Subpart G of this part.

§ 971.423 Best available technology.

The Administrator will require in all activities under new permits, and wherever practicable in activities under existing permits, the use of the best available technologies for the protection of safety, health, and the environment wherever such activities would have a significant adverse effect on safety, health, or the environment, (see §§ 971.203(b)(3), 971.602(f), and 971.604(a)), except where the Administrator determines that the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies.

§ 971.424 Monitoring requirements.

Each commercial recovery permit will require the permittee:

(a) To allow the Administrator to place appropriate Federal officers or employees as observers aboard vessels used by the permittee in commercial recovery activities to:

(1) Monitor activities at times, and to the extent, the Administrator deems reasonable and necessary to assess the effectiveness of the TCRs of the permit; and

(2) Report to the Administrator whenever those officers or employees have reason to believe there is a failure to comply with the TCRs;

(b) To cooperate with Federal officers and employees in the performance of monitoring functions; and

(c) To monitor the environmental effects of the commercial recovery activities in accordance with a monitoring plan approved and issued by NOAA as permit TCRs and to submit data and other information as necessary to permit evaluation of environmental effects. The environmental monitoring plan and reporting will respond to the concerns and procedures discussed in Subpart F.

§ 971.425 Changes of circumstances.

Each permit must require the permittee to advise the Administrator of any changes of circumstances which might constitute a revision which would be a major change under § 971.412(c). Changes in ownership, financing, and use conflicts are examples, as are technology or methodology changes including those which might result in significant adverse environmental effects.

§ 971.426 Annual report and records maintenance.

Each permit will require the permittee to submit an annual report and maintain information in accordance with § 971.801 including compliance with the commercial recovery plan and the quantities of hard mineral resources recovered and the disposition of such resources.

§ 971.427 Processing outside the United States.

If appropriate TCRs will incorporate provisions to implement the decision of the Administrator regarding the return of resources processed outside the United States, in accordance with § 971.408.

§ 971.428 Other necessary permits.

Each permit will provide that securing the deep seabed mining permit for activities described in the recovery plan and accompanying application does not eliminate the need to secure all other necessary Federal, State, and local permits.

§ 971.429 Special terms, conditions and restrictions.

Although the general criteria and standards to be used in establishing TCRs for a permit are set forth in this part, as referenced in § 971.418 through § 971.428, the Administrator may impose special TCRs for the conservation of natural resources, protection of the environment, or the safety of life and property at sea when required by differing physical and environmental conditions.

§ 971.430 Other Federal requirements.

Pursuant to § 971.211, another Federal agency, or a State acting under Federal authority, upon review of a commercial recovery permit application submitted under this part, may propose that certain TCRs be added to the permit, to assure compliance with any law or regulation within that agency's area of responsibility. The Administrator will include appropriate TCRs in a permit.

Subpart E—Resource Development

§ 971.500 General.

Several provisions in the Act relate to appropriate mining techniques or mining efficiency. These raise what could be characterized as resource development issues. In particular, section 103(a)(2)(C) requires a resource assessment to be provided with the recovery plan. Section 103(a)(2)(D) of the Act provides that the applicant will select the size and location of the area of a recovery plan, which will be approved unless the Administrator finds that the area is not a "logical mining unit" or the commercial recovery activities in the proposed site would result in a significant adverse environmental effect which cannot be avoided by the imposition of reasonable restrictions. Also, pursuant to section 108 of the Act, the applicant's recovery plan and the TCRs of each permit must be designed to ensure diligent development. In addition, for the purpose of conservation of natural resources, section 110 of the Act provides that each permit is to contain, as needed, terms, conditions, and restrictions which have due regard for the prevention of waste and the future opportunity for the commercial recovery of the unrecovered balance of the resources.

§ 971.501 Resource assessment, recovery plan, and logical mining unit.

(a) The applicant must submit with the application a resource assessment to provide a basis for assessing the area applied for. This assessment must include a discussion of mineable and unmineable areas, taking into account nodule grade, nodule concentration, and other factors such as seafloor topography. These areas may be delineated graphically. The resources in the area must be described in relation to the applicant's production requirements, operating period, and recovery efficiency in order to justify the area applied for.

(b) The applicant shall select the size and location of the area of the recovery plan, which area shall be approved unless the Administrator finds that, among other considerations (see § 971.301(a)), the area is not a logical mining unit. In the case of a commercial recovery permit, a logical mining unit is an area of the deep seabed:

(1) In which hard mineral resources can be recovered in sufficient quantities to satisfy the permittee's estimated production requirements over the initial 20-year term of the permit in an efficient, economical, and orderly manner with due regard for conservation and protection of the environment, taking into consideration the resource data, other relevant physical and environmental characteristics, and the state of the technology of the applicant set out in the recovery plan;

(2) Which is not larger than necessary to satisfy the permittee's estimated production requirements over the initial 20-year term of the permit; and

(3) In relation to which the permittee's estimated production requirements are not found by the Administrator to be unreasonable.

(c) Approval by the Administrator of a proposed logical mining unit will be based on a case-by-case review of each application. The area need not consist of contiguous segments, as long as each segment would be efficiently mineable and the total proposed area constitutes a logical mining unit.

(d) In describing the area, the applicant must present the geodetic coordinates of the points defining the boundaries referred to the World Geodetic System (WGS) Datum. A boundary between points must be a geodesic. If grid coordinates are desired, the Universal Transverse Mercator Grid System must be used.

§ 971.502 Conservation of resources.

(a) If the Administrator establishes terms, conditions and restrictions relating to conservation of resources, he will employ a balancing process in the consideration of the state of the technology being developed, the processing system utilized and the value and potential use of any waste, the environmental effects of the recovery activities, economic and resource data, and the national need for hard mineral resources.

(b) The application must set forth how the applicant's proposed method of collecting nodules will conserve resources by providing for the future opportunity for commercial recovery of the unrecovered balance of the resources in the proposed permit area. Although preliminary and subject to change, the discussion must include a plan for the chronology of areas to be mined. This is needed in order for the Administrator to determine if selective mining, expected to be carried out in the early years to improve cash flow, is part of a long range recovery plan.

(c) If the applicant proposes a refining process that does not include the use of manganese in a productive manner, it may not render the manganese unavailable to future users by dispersing the tailings over a vast area unless such a scheme is necessary for the financial practicability of the commercial recovery activities of the applicant. A permittee must advise the Administrator in the annual report of the location, composition and quantity of manganese in tailings which remain after processing. Should national needs for manganese develop during the duration of a permit, e.g., in case of national emergency, the Administrator may cancel the exception granted involving dispersion of tailings. Applicants seeking an exception would be required to demonstrate how and in what time frame their commercial recovery processing activities could be modified to respond to new national needs.

§ 971.503 Diligent commercial recovery.

(a) Each permittee must pursue diligently the activities described in its approved commercial recovery plan. This requirement applies to the full scope of the plan, including environmental safeguards and monitoring systems. Permit TCRs will require periodic reasonable expenditures for commercial recovery by the permittee, taking into account the size of the area of the deep seabed to which the recovery plan applies and the amount of funds estimated by the Administrator to be required to initiate commercial recovery of hard mineral resources within the time limit established by the Administrator. However, required expenditures will not be established at a level which would discourage commercial recovery or operational efficiency.

(b) To meet the diligence requirement, the applicant must propose to the Administrator an estimated schedule of activities and expenditures pursuant to § 971.203(b)(2). The schedule must show, and the Administrator must be able to make a reasonable determination, that the applicant can reasonably develop the resources in the permit area within the term of the permit. There must be a reasonable relationship between the size of the recovery area and the financial and technological resources reflected in the application. The permittee must initiate the recovery of nodules in commerical quantities within ten years of the issuance of the permit unless this deadline is extended by the Administrator for good cause.

(c) Once commercial recovery is achieved, the permittee must, within reasonable limits and taking into consideration all relevant factors, maintain commercial recovery throughout the period of the permit. However, the Administrator will, for good cause shown, authorize temporary suspension of commercial recovery activities. The duration of any suspension will not exceed one year, unless the Administrator determines that conditions justify an extension of the suspension.

(d) Ultimately, the diligence requirement will involve a retrospective determination by the Administrator based on the permittee's reasonable conformance to the approved recovery plan. This determination, however, will take into account the need for some degree of flexibility in a recovery plan. It also will include consideration of the needs and stage of development of the permittee based on the approved recovery plan; legitimate periods of time when there is no or very low expenditure; and allowance for a certain degree of flexibility for changes encountered by the permittee in market conditions or other factors.

(e) The permittee must submit a report annually reflecting its conformance to the schedule of activities and expenditures contained in the permit and its associated recovery plan. In case of any changes requiring a revision to an approved permit and recovery plan, the permittee must advise the Administrator in accordance with § 971.413.

Subpart F—Environmental Effects

§ 971.600 General.

The Act contains several provisions which relate to environmental protection. For example, section 105(a)(4) requires that, before the Administrator may issue a commercial recovery permit, he must find that the commercial recovery proposed in the application cannot reasonably be expected to result in a significant adverse environmental effect. In addition, each permit issued must contain TCRs which prescribe actions the permittee must take in the conduct of commercial recovery activities to assure protection of the environment (section 109(b)). The Act also provides for modification by the Administrator of any TCR if relevant data and information indicate that modification is required to protect the quality of the environment (section 105(c)(1)(B)). The Administrator also may order an immediate suspension or modification of activities (section 106(c)), or require use of best available technologies (section 109(b)), to prevent a significant adverse environmental effect. Furthermore, each permit issued under the Act must require the permittee to monitor the environmental effects of commercial recovery activities in accordance with guidelines issued by the Administrator, and to submit information the Administrator finds necessary and appropriate to assess environmental effects and to develop and evaluate possible methods of mitigating adverse effects (section 114).

§ 971.601 Environmental requirements.

Before issuing a permit for the commercial recovery of deep seabed hard mineral resources, the Administrator must find that:

(a) The issuance of a permit cannot reasonably be expected to result in a significant adverse environmental effect, or, if there is insufficient information to make that determination, that no irreparable harm will result during a period when monitoring of commerical recovery is undertaken to gather sufficient information in order to determine the potential for or occurrence of any significant adverse environmental effect. In examining this issue, NOAA will give consideration to the following Ocean Discharge Criteria of the Clean Water Act (40 CFR Part 125, Subpart M), as they may pertain to discharges and other environmental perturbations related to the commercial recovery operations:

(1) The quantities, composition and potential for bioaccumulation or persistence of the pollutants to be discharged;

(2) The potential transport of such pollutants by biological, physical or chemical processes;

(3) The composition and vulnerability of the biological communities which may be exposed to such pollutants including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, or the presence of those species critical to the structure or function of the ecosystem such as those important for the food chain;

(4) The importance of the receiving water area to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism;

(5) The existence of special aquatic sites including but not limited to marine sanctuaries and refuges, parks, national and historic monuments, national seashores, wilderness areas and coral reefs;

(6) The potential impacts on human health through direct and indirect pathways;

(7) Existing or potential recreational and commercial fishing, including finfishing and shellfishing;

(8) Any applicable requirements of an approved Coastal Zone Management plan;

(9) Such other factors relating to the effects of the discharge as may be appropriate;

(10) Marine water quality criteria developed pursuant to section 304(a)(1) of the Clean Water Act; and

(b) The applicant has an approved monitoring plan (§ 971.603) and the resources and other capabilities to implement it.

§ 971.602 Significant adverse environmental effects.

(a) *Determination of significant adverse environmental effects.* The Administrator will determine the potential for or the occurrence of any significant adverse environmental effect or impact (for the purposes of sections 103(a)(2)(D), 105(a)(4), 106(c) and 109(b) (second sentence) of the Act), on a case-by-case basis.

(b) *Basis for determination.* Determinations will be based upon the best information available, including relevant environmental impact statements, NOAA-collected data, monitoring results, and other data provided b the applicant or permittee, as well a consideration of the criteria i § 971.601(a).

(c) *Related considerations.* I making a determination the Administrator may take into account an TCRs or other mitigation measures.

(d) *Activities with no significant adverse environmental effect.* NOAA believes that exploration-type activities as listed in the license regulations (15 CFR 970.701), require no further environmental assessment.

(e) *Activities with potential for significant adverse environmental effects.* NOAA research has identified at-sea testing of recovery equipment, the recovery of manganese nodules in commercial quantities from the deep seabed, and the construction and operation of commercial-scale processing facilities as activities which may have some potential for significant adverse envirnomental effects.

(f) *Related terms, conditions and restrictions.* Permits will be issued with TCRs containing environmental requirements with respect to protection (pursuant to § 971.419), mitigation (pursuant to § 971.419), or best available technology requirements (pursuant to § 971.423), as appropriate, and monitoring requirements (pursuant to § 971.424) to acquire more information on the environmental effects of deep seabed mining.

§ 971.603 At-sea monitoring.

(a) An applicant must submit with its application a monitoring plan designed to enable the Administrator to assess environmental impacts and to develop and evaluate possible methods of mitigating adverse environmental effects, to validate assessments made in the EIS, and to assure compliance with the environmental protection requirements of this part.

(b) The monitoring plan shall include a characterization of the proposed mining system in terms of collector contact, benthic discharge and surface discharge.

(c) The monitoring plan shall include determination of (1) the spatial and temporal characteristics of the mining ship discharges; (2) the spatial extent and severity of the benthic impact, including recovery rate and pattern of benthic recolonization; and (3) any secondary effects that result from the impact of the mining collector and benthic plume.

(d) The monitoring of benthic impact shall involve the study of two types of areas, each selected by the permittee in consultation with NOAA, which areas shall be representative of the environmental characteristics of the permittee's site:

(1) An impact reference area, located in a portion of a permit area tentatively scheduled to be mined early in a commercial recovery plan; and

(2) An interim preservational reference area, located in a portion of a permit area tentatively determined: to be non-mineable, not to be scheduled for mining during the commercial recovery plan, or to be scheduled for mining late in the plan.

Reference areas may be selected provisionally prior to application for a commercial recovery permit.

(e) The following specific environmental parameters must be proposed for examination in the applicant's monitoring plan:

(1) Discharges—

(i) Salinity, temperature, density.

(ii) Suspended particulates concentration and density.

(iii) Particulate and dissolved nutrients and metals.

(iv) Size, configuration, and velocities of discharge.

(2) Upper water column—

(i) Nutrients.

(ii) Endangered species (observations).

(iii) Salinity, temperature, density.

(iv) Currents and direct current shear.

(v) Vertical distribution of light.

(vi) Suspended particulate material advection and diffusion.

(vii) In-situ settling velocities of suspended particulates.

(viii) Zooplankton and trace metals uptake.

(ix) Fish larvae.

(x) Behavior of biota, including commercially and recreationally valuable fish.

(3) Lower water column and seafloor—

(i) Currents.

(ii) Suspended particulate material advection and diffusion.

(iii) In-situ settling velocities of suspended particulates.

(iv) Benthic scraping and blanketing, and their impacts and recovery.

(f) The monitoring plan shall include provision for monitoring those areas impacted by the permittee's mining activities, even if such areas fall outside its minesite, where the proposed activities have the potential to cause significant adverse environmental effect or irreparable harm in the outside area.

(g) After the Administrator's approval of the monitoring plan, this plan will become a permit TCR. The monitoring plan TCR will include, to the maximum extent practicable, identification of those activities or events that could cause suspension or modification due to environmental effects under § 971.417, or permit revocation in the event that these effects cannot be adequately mitigated. The TCR also will authorize refinement of the monitoring plan prior to testing and commercial-scale recovery, and at other appropriate times, if refinement is necessary to reflect accurately proposed operations or to incorporate recent research or monitoring results.

(h) If test mining is proposed, the applicant shall include in the monitoring plan a monitoring plan for the test(s) as well as a strategy for using the result to monitor more effectively commercial-scale recovery. This monitoring shall address concerns expressed in the PEIS and in the permit EIS.

(i) The monitoring plan shall include a sampling strategy that assures: that it is based on sound statistical methods, that equipment and methods be scientifically accepted, that the personnel who are planning, collecting and analyzing data be scientifically well qualified, and that the resultant data be submitted to the Administrator in accordance with formats of the

National Oceanographic Data Center and other formats as may be specified by the Administrator.

(j) Pursuant to section 114(1) of the Act, the Administrator intends to place observers onboard mining vessels, not only to ensure that permit TCRs are followed, but also to evaluate the effectiveness of monitoring strategies, both in terms of protecting the environment and in being cost-effective (See § 971.1005), and if necessary, to develop potential mitigation measures. If modification of permit TCRs or regulations is required to protect the quality of the environment, the Administrator may modify TCRs pursuant to § 971.414, or the regulations pursuant to § 971.804.

§ 971.604 Best available technologies (BAT) and mitigation.

(a) The Administrator shall require in all activities under new permits, and wherever practicable in activities under existing permits, the use of the best available technologies for the protection of safety, health, and the environment wherever such activities would have a significant adverse effect on safety, health, or the environment, except where the Administrator determines that the incremental benefits are clearly insufficient to justify the incremental costs of using such technologies. Because of the embryonic nature of the industry, NOAA is unable either to specify particular equipment or procedures comprising BAT or to define performance standards. Until such experience exists, the applicant shall submit such information as is necessary to indicate, as required above, the use of BAT, the alternatives considered to the specific equipment or procedures proposed, and the rationale as to why one alternative technology was selected in place of another. This analysis shall include a discussion of the relative costs and benefits of the technologies considered.

(b) NOAA is not specifying particular mitigation methodologies or techniques at this time (such as requiring the sub-surface release of mining vessel discharges), but expects applicants and permittees to develop and carry out their operations, to the extent possible, to minimize adverse environmental effects and to be able to demonstrate efforts to that end. The applicant must submit a plan describing how he would mitigate a problem, if it were caused by the surface release of mining vessel discharges, including a plan for the monitoring of any discharges. Based upon monitoring results, NOAA may find it necessary in the future to specify particular procedures for minimizing adverse environmental effects. These procedures would be incorporated into permit TCRs.

(c) NOAA will require the permittee to report, prior to implementation, any proposed technological or operational changes that will increase or have unknown environmental effects. Changes in composition, concentration or size distribution of suspended particulates discharged from the mining vessel, water depth of vessel discharges, depth of cut in the seafloor of the mining collector, and direction or amount of sediment discharged at the seafloor are factors of concern to NOAA. In reporting any such change, the permittee shall submit information to indicate the use of BAT, alternatives considered, and rationale for selecting one technology in place of another, in a manner comparable to and to the extent required in paragraph (a) of this section. If proposed changes have a high potential for increasing adverse environmental effects, the Administrator may disapprove or require modification of the changes.

§ 971.605 Stable Reference Areas. [Reserved]

§ 971.606 Onshore information.

(a) To assist the Administrator in complying with NEPA requirements and to enable NOAA to function as lead agency in preparing permit site-specific environmental impact statements (EISs) and facilitating the preparation and processing of other environmental documents and permits, the applications must include the following information:

(1) The location and affected environment of port, transport, processing and waste disposal facilities and asso-

ciated facilities (e.g., maps, land use and layout);

(2) A description of the environmental consequences and socio-economic effects of construction and operation of the facilities, including waste characteristics and toxicity;

(3) Any mitigating measures that may be proposed;

(4) Certification of consistency with the federally approved State coastal management program, where applicable, and evidence of the status of compliance with other State or local requirements relating to protection of the environment; and

(5) Alternative sites and technologies considered by the applicant and the considerations which eliminate their selection.

(b) The applicant must consult with NOAA as early as possible concerning the information to be submitted to NOAA to prepare an adequate environmental impact statement. The applicant is encouraged to consult with potentially affected States as early as is practicable [see also § § 971.200(g) and 971.213].

(c) The requirements of paragraphs (a)(1)-(3) and (5) of this section also apply if approval of processing outside the United States is requested by the applicant, in accordance with Executive Order 12114 which requires the environmental review of major Federal actions abroad. Information detailing the socio-economic impacts of foreign processing activities is not required.

Subpart G—Safety of Life and Property at Sea

§ 971.700 General.

The Act contains several requirements that relate to assuring the safety of life and property at sea. For example, before the Administrator may issue a permit, he must find that the proposed recovery will not pose an inordinate threat to the safety of life and property at sea (section 105(a)(5)). The Coast Guard, in consultation with NOAA, must require in any permit issued under the Act, in conformity with principles of international law, that vessels documented in the United States and used in activities authorized under the permit comply with conditions regarding the design, construction, alteration, repair, equipment, operation, manning and maintenance relating to vessel and crew safety and the safety of life and property at sea (section 112(a)). The Administrator may impose or modify TCRs for a permit if required to promote the safety of life and property at sea (section 105(c)(1)(B)).

§ 971.701 Criteria for safety of life and property at sea.

Response to the safety at sea requirements in essence will involve vessel inspection requirements, as identified by present laws and regulations. The primary inspection statutes pertaining to United States flag vessels are: 46 App. U.S.C. 86 (Loadlines) and 46 U.S.C. 3301 (Inspection of Seagoing Barges, Seagoing Motor Vessels, and Freight Vessels). United States flag vessels will be required to meet all applicable regulatory requirements, including the requirement for a current valid Coast Guard Certificate of Inspection (pursuant to § 971.205(a)). United States flag vessels are under United States jurisdiction on the high seas and subject to domestic enforcement procedures. With respect to foreign flag vessels, the SOLAS 74 or SOLAS 60 certificate requirements specified in § 971.205(b) apply.

Subpart H—Miscellaneous

§ 971.800 General.

The subpart contains miscellaneous provisions pursuant to the Act which are applicable to exploration licenses and commercial recovery permits.

§ 971.801 Records to be maintained and information to be submitted by licensees and permittees.

(a)(1) In addition to the information specified elsewhere in the part and in 15 CFR Part 970, each licensee and permittee must keep such records, consistent with standard accounting principles, as specified by the Administrator in the license or permit. Such records shall include information which will fully disclose expenditures for exploration for, or commercial recovery of hard mineral resources in the area under license or permit, and any other information which will facilitate an effective audit of these expenditures.

(2) The Administrator and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for purposes of audit and examination to any books, documents, papers, and records of licensees and permittees which are necessary and directly pertinent to verification of the expenditures referred to in paragraph (a)(1) of this section.

(b) In addition to the information specified elsewhere in this part and in 15 CFR Part 970, each applicant, licensee or permittee will be required to submit to the Administrator, upon request, data or other information the Administrator may reasonably need for purposes of:

(1) Making determinations with respect to the issuance, revocation, modification, or suspension of the license or permit in question;

(2) Evaluating the effectiveness of license or permit TCRs;

(3) Compliance with the biennial Congressional report requirement contained in Section 309 of the Act; and

(4) Evaluation of the exploration or commercial recovery activities conducted by the licensee or permittee.

At a minimum, licensees and permittees shall submit an annual written report within 90 days after each anniversary of the license or permit issuance or transfer, discussing exploration or commercial recovery activities and expenditures. The report shall address diligence requirements (see § 971.503 and 15 CFR 970.602), implementation of any approved monitoring plan (see § 971.602 and 15 CFR 970.522(c) and 970.702(a)), and applicable changes which do not constitute revisions (see § 971.413(e) and 15 CFR 970.513(c)). Permittees must also report the tonnage of nodules recovered (§ 971.426) and discuss manganese conservation measures (see § 971.502).

§ 971.802 Public disclosure of documents received by NOAA.

(a) *Purpose.* This section provides a procedure by which persons submitting information pursuant to this part and 15 CFR Part 970 may request that certain information not be subject to public disclosure. The substantiation requested is intended to assure that NOAA has a complete and proper basis for determining the legality and appropriateness of withholding or releasing the identified information if a public request for disclosure is received.

(b) *Written requests for confidential treatment.* (1) Any person who submits any information pursuant to this part or 15 CFR Part 970, which information is considered by that person to be protected by the Trade Secrets Act (18 U.S.C. 1905) or otherwise to be a trade secret or commercial or financial information which is privileged or confidential, may request that the Administrator give the information confidential treatment.

(2)(i) Any request for confidential treatment of information:

(A) Should be submitted at the time of submission of information;

(B) Should state the period of time for which confidential treatment is desired (e.g., until a certain date, or until the occurrence of a certain event, or permanently);

(C) Must be submitted in writing; and

(D) Must include the name, mailing address, and telephone number of an agent of the submitter who is authorized to receive notice of requests for disclosure of the information pursuant to paragraph (d) of this section.

(ii) If information is submitted to the Administrator without an accompanying request for confidential treatment, the notice referred to in paragraph (d)(2) of this section need not be given. If a request for confidential treatment is received after the information itself is received, the Administrator will make efforts to the extent administratively practicable to associate the request with copies of the previously submitted information in the files of NOAA and the Federal agencies to which the Administrator distributed the information.

(3)(i) Information subject to a request for confidential treatment must be segregated from information for which confidential treatment is not being requested, and each page (or segregable portion of each page) subject to the request must be clearly marked with the name of the person requesting confidential treatment, the name of the applicant, licensee or permittee, and an identifying legend such as "Proprietary Information" or "Confidential Treatment Requested." Where this marking proves impracticable, a cover sheet containing the identifying names and legend must be securely attached to the compilation of information for which confidential treatment is requested. Each copy of the information for which confidential treatment has been requested must be cross-referenced to the appropriate section of the application or other document. All information for which confidential treatment is requested pertaining to the same application or other document must be submitted to the Administrator in a package separate from that information for which confidential treatment is not being requested.

(ii) Each copy of any application or other document with respect to which confidential treatment of information has been requested must indicate, at each place in the application or document where confidential information has been deleted, that confidential treatment of information has been requested.

(4) Normally, the Administrator will not make a determination as to whether confidential treatment is warranted until a request for disclosure of the information is received. However, on a case-by-case basis, the Administrator may make a determination in advance of a request, where it would facilitate obtaining voluntarily submitted information (rather than information required to be submitted under this part).

(c) *Substantiation of request for confidential treatment.* (1) Any request for confidential treatment may include a statement of the basis for believing that the information is deserving of confidential treatment, which addresses the issues relevant to a determination of whether the information is a trade secret, or commercial or financial information which is privileged or confidential. To the extent permitted by applicable law, part or all of any substantiation statement submitted will be treated as confidential if so requested, and must be segregated, marked, and submitted in accordance with the procedure described in paragraph (b)(3) of this section.

(2) Issues addressed in the statement should include:

(i) The commercial or financial nature of the information;

(ii) The nature and extent of the competitive advantage enjoyed as a result of possession of the information;

(iii) The nature and extent of the competitive harm which would result from public disclosure of the information;

(iv) The extent to which the information has been disseminated to employees and contractors of the person submitting the information;

(v) The extent to which persons other than the person submitting the information possesses, or have access to, the same information; and

(vi) The nature of the measures which have been and are being taken to protect the information from disclosure.

(d) *Requests for disclosure of trade secrets, privileged, or confidential information.* (1) Any request for disclosure of information submitted, reported or collected pursuant to this part must be made in accordance with 15 CFR 903.7.

(2) Upon receipt of a request for disclosure of information for which confidential treatment has been requested, the Administrator immediately will issue notice by an expeditious means (such as by telephone, confirmed by certified or registered mail, return receipt requested) of the request for disclosure to the person who requested confidential treatment of the information or to the designated agent. The notice also will:

(i) Inquire whether that person continues to maintain the request for confidential treatment;

(ii) Notify that person of the date (generally, not later than the close of business on the seventh working day after issuance of the notice) by which the person is strongly encouraged to deliver to the Administrator a written statement that the person either:

(A) Waives or withdraws the request for confidential treatment in full or in part; or

(B) Confirms that the request for confidential treatment is maintained;

(iii) Inform that person that by a date the Administrator specifies (generally, not later than the close of business on the seventh working day after issuance of the notice), the person:

(A) Is strongly encouraged to deliver to the Administrator a written statement addressing the issues listed in paragraph (c)(2) of this section, describing the basis for believing that the information is deserving of confidential treatment, if this statement was not previously submitted;

(B) Is strongly encouraged to deliver to the Administrator an update of or supplement to any statement previously submitted under paragraph (c) of this section; and

(C) May present to the Administrator in a form the Administrator deems appropriate (such as by telephone or in an informal conference) agruments against disclosure of the information; and

(iv) Inform that person that the burden is on him to assure that any response to the notice is delivered to the Administrator within the time specified in the notice.

(3) To the extent permitted by applicable law, part or all or of any statement submitted in response to any notice issued under paragraph (d)(2) will be treated as confidential if so requested by the person submitting the response. Any response for which confidential treatment is requested must be segregated, marked and submitted in accordance with the procedures described in paragraph (b)(3) of this section.

(4) Upon the expiration of the time allowed for response under paragraph (d)(2) of this section, the Administrator will determine, in consultation with the General Counsel for the Department of Commerce, whether confidential treatment is warranted based on the information then available to NOAA.

(5) If the person who requested confidential treatment waives or withdraws that request, the Administrator will proceed with appropriate disclosure of the information.

(6) If the Administrator determines that confidential treatment is warranted, he will so notify the person requesting confidential treatment, and will issue an initial denial of the request for disclosure of records in accordance with 15 CFR 903.8.

(7) If the Administrator determines that confidential treatment is not warranted for part or all of the information, the Administrator immediately will issue notice by an expeditious means (such as by telephone, confirmed by certified or registered mail, return receipt requested) to the person who requested confidential treatment. The notice will state:

(i) The basis for the Administrator's determination;

(ii) That the Administrator's determination constitutes final agency action on the request for confidential treatment;

(iii) That the final agency action is subject to judicial review under Chapter 7 of Title 5, United States Code; and

(iv) That on the seventh working day after issuance of the notice described in this paragraph (d)(7), the Administrator will make the information available to the person who requested disclosure unless the Administrator has first been notified of the filing of an action in a Federal court to obtain judicial review of the determination, and the court has issued an appropriate order preventing or limiting disclosure.

(8) The Administrator will keep a record of the date any notice is issued and the date any response is received, by the Administrator, under this paragraph (d).

(9) In all other respects, procedures for handling requests for records containing information submitted to, reported to, or collected by the Administrator pursuant to this part will be in accordance with 15 CFR Part 903. For example, if ten working days have passed after the receipt of a request for disclosure and, despite the exercise of due diligence by the agency, the Administrator cannot make a determination as to whether confidential treat-

ment is warranted, the Administrator will issue appropriate notice in accordance with 15 CFR 903.8(b)(5).

(e) *Direct submission of confidential information.* If any person has reason to believe that it would be prejudiced by furnishing information required from it to the applicant, licensee or permittee, that person may file the required information directly with the Administrator. Information for which the person requests confidential treatment must be segregated, marked, and submitted in accordance with the procedures described in paragraph (b)(3) of this section.

(f) *Protection of confidential information transmitted by the Administrator to other agencies.* Each copy of information for which confidential treatment has been requested which is transmitted by the Administrator to other Federal agencies will be accompanied by a cover letter containing:

(1) A request that the other Federal agency maintain the information in confidence in accordance with applicable law (including the Trade Secret Act, 18 U.S.C. 1905) and any applicable protective agreement entered into by the Administrator and the Federal agency receiving the information;

(2) A request that the other Federal agency notify the Administrator immediately upon receipt of any request for disclosure of the information; and

(3) A request that all copies of the information be returned to the Administrator for secure storage or disposal promptly after the Federal agency determines that it no longer needs the information for its official use.

(g) When satisfied that adequate protection against public disclosure exists, applicants should provide the State agency with confidential and proprietary information which the State agency maintains is necessary to make a reasoned decision on the consistency of the proposal. State agency requests for such information must be related to the necessity of having such information to assess adequately the coastal zone effects of the proposal.

§ 971.803 Relinquishment and surrender of licenses and permits.

(a) Any licensee or permittee may at any time, without penalty:

(1) Surrender to the Administrator a license or permit issued to the licensee or permittee; or

(2) Relinquish to the Administrator, in whole or in part, any right to conduct any exploration or commercial recovery activities authorized by the license or permit.

(b) Any licensee or permittee who surrenders, or relinquishes any right under, a license or permit will remain liable with respect to all violations and penalties incurred, and damage to persons or property caused, by the licensee or permittee as a result of activities engaged in by the licensee or permittee under the license or permit.

§ 971.804 Amendment to regulations for conservation, protection of the environment, and safety of life and property at sea.

The Administrator may amend the regulations in this part and 15 CFR Part 970 at any time as the Administrator determines to be necessary and appropriate in order to provide for the conservation of natural resources, protection of the environment, or the safety of life and property at sea. The amended regulations will apply to all exploration or commercial recovery activities conducted under any license or permit issued or maintained pursuant to this part or 15 CFR Part 970, except that amended regulations which provide for conservation of natural resources will apply to activities conducted under an existing license or permit during the present term of that license or permit only if the Administrator determines that the amended regulations providing for conservation of natural resources will not impose serious or irreparable economic hardship on the licensee or permittee. Any amendment to regulations under this section will be made pursuant to the procedures in Subpart I of this part.

§ 971.805 Computation of time.

Except where otherwise specified, Saturdays, Sundays and Federal Government holidays will be included in computing the time period allowed for filing any document or paper under this part or 15 CFR Part 970, but when a time period expires on any of these days, that time period will be extended to include the next following Federal Government work day. Filing periods expire at the close of business on the day specified, for the office specified.

Subpart I—Uniform Procedures

§ 971.900 Applicability.

The regulations of this subpart govern the following hearings conducted by NOAA under this part and under 15 CFR Part 970:

(a) All adjudicatory hearings required by section 116(b) of the Act to be held on the following actions upon a finding by the Administrator that one or more specific and material issues of fact exist which require resolution by formal process, including but not limited to:

(1) All applications for issuance or transfer of licenses or permits;

(2) All proposed TCRs on a license or permit; and

(3) All proposals to modify significantly a license or permit;

(b) Hearings conducted under section 105(b)(3) of the Act on objection by a licensee or permittee to any term, condition or restriction in a license or permit, or to modification thereto, where the licensee or permittee demonstrates, after final action by the Administrator on the objection, that a dispute remains as to a material issue of fact;

(c) Hearings conducted in accordance with section 106(b) of the Act pursuant to a timely request by an applicant or a licensee or permittee for review of:

(1) A proposed denial of issuance or transfer of a license or permit; or

(2) A proposed suspension or modification of particular activities under a license or permit after a Presidential determination pursuant to section 106(a)(2)(B) of the Act;

(d) Hearings conducted in accordance with section 308(c) of the Act to amend regulations for the purpose of conservation of natural resources, protection of the environment, and safety of life and property at sea;

(e) Hearings conducted in accordance with § 971.302 or 15 CFR 970.407 on a proposal to deny certification of an application; and

(f) Hearings conducted in accordance with 15 CFR Part 970, Subpart C to determine priority of right among preenactment explorers.

§ 971.901 Formal hearing procedures.

(a) *General.* (1) All hearings described in § 971.900 are governed by Subpart C of 15 CFR Part 904, as modified by this section. The rules in this subpart take precedence over 15 CFR Part 904, Subpart C, to the extent there is a conflict.

(2) Hearings held under this section will be consolidated insofar as practicable with hearings held by other agencies.

(3) For the purposes of this subpart, "involved applicant, licensee or permittee" means an applicant, licensee or permittee the status of whose application, license, permit or activities conducted under the license or permit may be altered by the Administrator as a result of proceedings under this subpart.

(b) *Decision to hold a hearing.* Whenever the Administrator finds that a formal hearing is required by the provisions of this part or 15 CFR Part 970, he will provide for a formal hearing. Upon deciding to hold a formal hearing, the Administrator will refer the proceeding to the Department of Commerce Office of Administrative Law Judges for assignment to an Administrative Law Judge to serve as presiding officer for the hearing.

(c) *Notice of formal hearing.* (1) The Administrator will publish notice of the formal hearing in the Federal Register at least 15 days before the beginning of the hearing, and will send written notice by registered or certified mail to any involved applicant, licensee or permittee and to all persons who submitted written comments upon the action in question, or who testified at any prior informal hearing on the action or who filed a request for the formal hearing under this part or 15 CFR Part 970.

(2) Notice of a formal hearing will include, among other things:

(i) Time and place of the hearing and the name of the presiding judge.

as determined under paragraph (b) of this section;

(ii) The name and address of the person(s) requesting the formal hearing or a statement that the formal hearing is being held by order of the Administrator;

(iii) The issues in dispute which are to be resolved in the formal hearing;

(iv) The due date for filing a written request to participate in the hearing in accordance with paragraphs (f)(2) and (f)(3) of this section; and

(v) Reference to any prior informal hearing from which the issues to be determined arose.

(d) *Powers and duties of the administrative law judge.* In addition to the powers enumerated in 15 CFR Part 904. Subpart C, judges will have the power to:

(1) Regulate the course of the hearing and the conduct of the parties, interested persons and others submitting evidence, including but not limited to the power to require the submission of part or all of the evidence in written form if the judge determines a party will not be prejudiced thereby, and if otherwise in accordance with law;

(2) Rule upon requests submitted in accordance with paragraph (f)(2) of this section to participate as a party, or requests submitted in accordance with paragraph (f)(3) of this section to participate as an interested person in a proceeding, by allowing, denying, or limiting such participation; and

(3) Require at or prior to any hearing, the submission and exchange of evidence.

(e) *Argument.* At the close of the formal hearing, each party will be given the opportunity to submit written arguments on the issues before the judge.

(f) *Hearing participation.* (1) Parties to the formal hearing will include:

(i) The NOAA General Counsel;

(ii) Any involved applicant, licensee or permittee; and

(iii) Any other person determined by the judge, in accordance with paragraph (f)(2) below, to be eligible to participate as a full party.

(2) Any person desiring to participate as a party in a formal hearing must submit a request to the judge to be admitted as a party. The request must be submitted within ten days after the date of mailing or publication of notice of a decision to hold a formal hearing, whichever occurs later. Such person will be allowed to participate if the judge finds that the interests of justice and a fair determination of the issues would be served by granting the request. The judge may entertain a request submitted after the expiration of the ten days, but such a request may only be granted upon an express finding on the record that:

(i) Special circumstances justify granting the request;

(ii) The interests of justice and a fair determination of the issues would be served by granting the request;

(iii) The requestor has consented to be bound by all prior written agreements and stipulations agreed to by the existing parties, and all prior orders entered in the proceedings; and

(iv) Granting the request will not cause undue delay or prejudice the rights of the existing parties.

(3)(i) Any interested person who desires to submit evidence in a formal hearing must submit a request within ten days after the dates of mailing or publication of notice of a decision to hold a formal hearing, whichever occurs later. The judge may waive the ten day rule for good cause, such as if the interested person, making this request after the expiration of the ten days, the formal hearing, and the evidence he proposes to submit may significantly affect the outcome of the proceedings.

(ii) The judge may permit an interested person to submit evidence at any formal hearing if the judge determines that such evidence is relevant to facts in dispute concerning the issue(s) being adjudicated. The fact that an interested person may submit evidence under this paragraph at a hearing does not entitle the interested person to participate in other ways in the hearing unless allowed by the judge under paragraph (f)(3)(iii) below.

(iii) The judge may allow an interested person to submit oral testimony, oral arguments or briefs, or to cross-examine witnesses or participate in other ways, if the judge determines:

(A) That the interests of justice would be better served by allowing such participation by the interested person; and

(B) That there are compelling circumstances favoring such participation by the interested person.

(g) *Definition of issues.* (1) Whenever a formal hearing is conducted pursuant to this section the Administrator may certify the issues for decision to the judge, and if the issues are so certified, the formal hearing will be limited to those issues.

(2) Whenever a formal hearing is conducted pursuant to a request by an applicant, licensee or permittee for review of a denial of certification, issuance or transfer of a license or permit in accordance with section 106(a)(4) of the Act, or pursuant to an objection to any term, condition, or restriction in a permit in accordance with section 105(b)(3) or (c)(4) of the Act, no issues may be raised by any party or interested person that were not previously raised in the administrative proceedings on the action pursuant to any such section, unless the judge determines that good cause is shown for the failure to raise them. Good cause includes the case where the party seeking to raise the new issues shows that it could not reasonably have ascertained the issues at a prior stage in the administrative process, or that it could not have reasonably anticipated the relevance or materiality of the information sought to be introduced.

(h) *Decisions.*—(1) *Proposed findings of fact and conclusions of law.* The judge will allow each party to file with the judge proposed findings of fact, and in appropriate cases conclusions of law, together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs must be filed within ten days after the hearing or within such additional time as the judge may allow. Such proposals and briefs must refer to all portions of the record and to all authorities relied upon in support of each proposal. Reply briefs must be submitted within ten days after receipt of the proposed findings and conclusions to which they respond, unless the judge allows additional time.

(2) *Recommended decision.* (i) As soon as practicable, but normally not later than 90 days after the conclusion of the formal hearing, the judge will evaluate the record of the formal hearing and prepare and file a recommended decision with the Administrator. The decision will contain findings of fact, when appropriate, conclusions regarding all material isuses of law, and a recommendation as to the appropriate action to be taken by the Administrator. The judge will serve a copy of the decision on each party and upon the Administrator.

(ii) Within thirty days after the date the recommended decision is served, any party may file with the Administrator exceptions to the recommended decision. The exceptions must refer to all portions of the record and to all authorities relied on in support of the exceptions.

(3) *Final decision.* (i) As soon as practicable, but normally not later than 60 days after receipt of the recommended decision, the Administrator will issue a final decision. The final decision will include findings of fact and conclusions regarding material issues of law or discretion, as well as reasons therefor. The final decision may accept or reject all or part of the recommended decision. The Administrator shall assure that the record shows the ruling on each exception presented.

(ii) With respect to hearings held pursuant to section 116(b), the Administrator may defer announcement of his findings of fact until the time he takes final action with respect to any action described in section 116(a).

(iii) The Administrator will base the final decision upon the record already made except that the Administrator may issue orders:

(A) Specifying the filing of supplemental briefs; or

(B) Remanding the matter to the judge for the receipt of further evidence, or otherwise assisting in the determination of the matter.

(i) *Filing and service of documents.* (1) Whenever the regulations in this subpart or an order issued hereunder require a document to be filed within a certain period of time, such document will be considered filed as of the date of the postmark, if mailed, or (if not mailed) as of the date actually delivered to the office where filing is required. Time periods will begin to run on the day following the date of the document, paper, or event which begins at the time period.

(2) All submissions must be signed by the person making the submission, or by the person's attorney or other authorized agent or representative.

(3) Service of a document must be made by delivering or mailing a copy of the document to the known address of the person being served.

(4) Whenever the regulations in this subpart require service of a document, such service may effectively be made on the agent for the service of process or on the attorney for the person to be served.

(5) Refusal of service of a document by the person, his agent, or attorney will be deemed effective service of the document as of the date of such refusal.

(6) A certficate of the person serving the document by personal delivery or by mailing, setting forth the manner of the service, will be proof of the service.

Subpart J—Enforcement

§ 971.1000 General.

(a) *Purpose and scope.* (1) Section 302 of the Act authorizes the Administrator to assess a civil penalty, in an amount not to exceed $25,000 for each violation, against any person found to have committed an act prohibited by section 301 of the Act. Each day of a continuing violation is a separate offense.

(2) Section 106 of the Act describes the circumstances under which the Administrator may suspend or revoke a license or permit, or suspend or modify activities under a license or permit, in addition to or in lieu of imposing of a civil penalty, or in addition to imposing a fine.

(3) Section 306 of the Act makes provisions of the customs laws relating to, among other things, the remission or mitigation of forfeitures, applicable to forfeitures of vessels and hard mineral resources. The Administrator is authorized to entertain petitions for administrative settlement of property seizures made under the Act which would otherwise proceed to judicial forfeiture.

(4) Section 114 of the Act authorizes the Administrator to place observers on vessels used by a licensee or permittee under the Act to monitor compliance and environmental effects of activities under the license or permit.

(5) Section 117 of the Act describes the circumstances under which a person may bring a civil action against an alleged violator or against the Administrator for failure to perform a nondiscretionary duty, and directs the Administrator to issue regulations governing procedures prerequisite to such a civil action.

(6) The regulations in this subpart provide uniform rules and procedures for the assessment of civil penalties (§ 971.1001–§ 971.1002), and license and permit sanctions (§ 971.1003); the remission or mitigation of forfeitures (§ 971.1004); observers (§ 971.1005); protection of certain information related to enforcement (§ 971.1006); and procedures requiring persons planning to bring a civil action under section 117 of the Act to give advance notice (§ 971.1007).

(b) *Filing and service of documents.* (1) Except as otherwise provided by this subpart, filing and service of documents required by this subpart will be in accordance with § 971.901(i). The method for computing time periods set forth in § 971.901(i) also applies to any action or event, such as payment of a civil penalty, required by this subpart to take place within a specified period of time.

(2) If an oral or written request is made to the Administrator within ten days after the expiration of a time period established in this subpart for the required filing of documents, the Administrator may permit a late filing if the Administrator finds reasonable grounds for an inability or failure to file within the time periods. All extensions will be in writing. Except as provided by this paragraph, by 15 CFR 904.102 or by order of an administrative law judge, no requests for an extension of time may be granted.

§ 971.1001 Assessment procedure.

Subpart B of 15 CFR Part 904 governs the procedures for assessing a civil penalty under the Act, and the rights of any person against whom a civil penalty is assessed.

§ 971.1002 Hearing and appeal procedures.

(a) *Beginning of hearing procedures.* Following receipt of a written request for a hearing timely filed under 15 CFR 904.102, the Administrator will begin procedures under this section by forwarding the request, a copy of the NOVA, and any response thereto to the Department of Commerce, Office of Administrative Law Judges.

(b) Subpart C of 15 CFR Part 904 governs the hearing and appeal procedures for civil penalties assessed under the Act.

§ 971.1003 License and permit sanctions.

(a) *Application of this section.* This section governs the suspension or revocation of any license or permit issued under the Act, or the suspension or modification of any particular activity or activities under a license or permit, which suspension, revocation or modification is undertaken in addition to, or in lieu of, imposing a civil penalty under this subpart, or in addition to imposing a fine.

(b) *Basis for sanctions.* The Administrator may act under this section with respect to a license or permit issued under the Act, or any particular activity or activities under such a license or permit, if the licensee or permittee substantially fails to comply with any provision of the Act, any regulation or order issued under the Act, or any term, condition, or restriction in the license or permit.

(c) *Nature of sanctions.* In the Administrator's discretion and subject to the requirements of this section, the Administrator may take any of the following actions or combinations thereof with respect to a license or permit issued under the Act:

(1) Revoke the license or permit;

(2) Suspend the license or permit, either for a specified period of time or until certain stated requirements are met, or both; or

(3) Modify any activity under the license or permit, as by imposing additional requirements or restraints o the activity.

(d) *Notice of sanction.* (1) The A ministrator will prepare a notice sanction (NoS) setting forth the san tion to be imposed and the basis ther fore. The NoS will state:

(i) A concise statement of the fac believed to show a violation;

(ii) A specific reference to the prov sions of the Act, regulation, license o permit, or order allegedly violated;

(iii) The nature and duration of th proposed sanction;

(iv) The effective date of the sanction, which is 30 days after the date o the notice unless the Administrator establishes a different effective dat under paragraph (d)(4) or paragrap (e) of this section;

(v) That the licensee or permitte has 30 calendar days from receipt o the notice in which to request or waiv a hearing, under paragraph (f) of thi section; and

(vi) The determination made by the Administrator under paragraph (e)(1) of this section, and any time period that the Administrator provides the licensee or permittee under paragraph (e)(1) to correct a deficiency.

(2) If a hearing is requested in a timely manner, the sanction becomes effective as provided in the final decision of the Administrator issued pursuant to paragraph (g) of this section, unless the Administrator provides otherwise under paragraph (d)(4) of this section.

(3) The NoS will be served personally or by registered or certified mail, return receipt requested, on the licensee or permittee. The Administrator will also publish in the FEDERAL REGISTER a notice of his intention to impose a sanction.

(4) The Administrator may make the sanction effective immediately or otherwise earlier than 30 days after the date of the NoS if the Administrator finds, and issues an emergency order summarizing such finding and the basis therefor, that an earlier date is necessary to:

(i) Prevent a significant adverse environmental effect; or

(ii) Preserve the safety of life and property at sea.

best copy available

If the Administrator acts under this paragraph (d)(4), the Administrator will serve the emergency order as provided in paragraph (d)(3) of this section.

(5) The NoS will be accompanied by a copy of this subpart and the applicable provisions of 15 CFR Part 904 and 15 CFR Part 971 Subpart I.

(e) *Opportunity to correct deficiencies.* (1) Prior to issuing the NoS, the Administrator will determine whether the reason for the proposed sanction is a deficiency which the licensee or permittee can correct. Such determination, and the basis therefor, will be set forth in the NoS.

(2) If the Administrator determines that the reason for the proposed sanction is a deficiency which the licensee or permittee can correct, the Administrator will allow the licensee or permittee a reasonable period of time, up to 180 days from the date of the NoS, to correct the deficiency. The NoS will state the effective date of the sanction, and that the sanction will take effect on that date unless the licensee or permittee corrects the deficiency within the time prescribed or unless the Administrator grants an extension of time to correct the deficiency under paragraph (e)(3) of this section.

(3) The licensee or permittee may, within the time period prescribed by the Administrator under paragraph (e)(2) of the section, request an extension of time to correct the deficiency. The Administrator may, for good cause shown, grant an extension. If the Administrator does not grant the request, either orally or in writing before the effective date of the sanction, the request will be considered denied.

(4) When the licensee or permittee believes that the deficiency has been corrected, the licensee or permittee shall so advise the Administrator in writing. The Administrator will, as soon as practicable, determine whether or not the deficiency has been corrected and advise the licensee or permittee of such determination.

(5) If the Administrator determines that the deficiency has not been corrected by the licensee or permittee within the time prescribed under paragraph (e)(2) or (e)(3) of this section, the Administrator may:

(i) Grant the licensee or permittee additional time to correct the deficiency, for good cause shown;

(ii) If no hearing has been timely requested under paragraph (f)(1) of this section, notify the licensee or permittee that the sanction will take effect as provided in paragraph (e)(2) or (e)(3) of this section; or

(iii) If a request for hearing has been timely filed under paragraph (f)(1) of this section, and hearing proceedings have not already begun, or if the Administrator determines under paragraph (f)(3) of this section to hold a hearing, notify the licensee or permittee of the Administrator's intention to proceed to a hearing on the matter.

(f) *Opportunity for hearing.* (1) The licensee or permittee has 30 days from receipt of the NoS to request a hearing. However, no hearing is required with respect to matters previously adjudicated in an administrative or judicial hearing in which the licensee or permittee has had an opportunity to participate.

(2) If the licensee or permittee requests a hearing, a written and dated request shall be served either in person or by certified or registered mail, return receipt requested, at the address specified in the NoS. The request shall either attach a copy of the relevant NoS or refer to the relevant NOAA case number.

(3) If no hearing is requested under paragraph (f)(2) of this section, the Administrator may nonetheless order a hearing if the Administrator determines that there are material issues of fact, law, or equity to be further explored.

(g) *Hearing and decision.* (1) If a timely request for a hearing under paragraph (f) of this section is received, or if the Administrator orders a hearing under paragraph (f)(3) of this section, the Administrator will promptly begin proceedings under this section by forwarding the request, a copy of the NoS and any response thereto to the Department of Commerce Office of Administrative Law Judges which will docket the matter for hearing. Written notice of the referral will promptly be given to the licensee or permittee, with the name and address of the attorney representing the Administrator in the proceedings (the agency representative). Thereafter, all pleading and other documents must be filed directly with the Department of Commerce Office of Administrative Law Judges, and a copy must be served on the opposing party (respondent or agency representative).

(2) Except as provided in this section, the hearing and appeal procedures in 15 CFR Part 904 Subpart C apply to any hearing held under this section.

(3) If the proposed sanction is the result of a correctable deficiency, the hearing will proceed concurrently with any attempt to correct the deficiency unless the parties agree otherwise or the Administrative Law Judge orders differently.

(4) As soon as practicable, but normally not later than 90 days after the conclusion of the formal hearing, the judge will file with the Administrator a recommended decision prepared in accordance with § 971.901(h)(2).

(5) The Administrator will issue a final decision in accordance with § 971.901(h)(3). The decision will be a final order of the Administrator.

(6) The Administrator will serve notice of the final decision on the licensee or permittee in the manner described by paragraph (d)(3) of this section.

§ 971.1004 Remission or mitigation of forfeitures.

(a) Authorized enforcement officers are empowered by section 304 of the Act to seize any vessel (together with its gear, furniture, appurtenances, stores, and cargo) which reasonably appears to have been used in violation of the Act, if necessary to prevent evasion of the enforcement of this Act, or of any regulation, order or license or permit issued pursuant to the Act. Enforcement agents may also seize illegally recovered or processed hard mineral resources, as well as other evidence related to a violation. Section 306 of the Act provides for the judicial forfeiture of vessels and hard mineral resources.

(b) Subpart F of 15 CFR Part 904 governs procedures regarding seized property that is subject to forfeiture or has been forfeited under the Act, including the remission or mitigation of forfeitures.

(c) Unless otherwise directed in a notice concerning the seized property, a petition for relief from forfeiture under the Act and pursuant to 15 CFR 904.506(b) shall be addressed to the Administrator and filed with the Ocean Minerals and Energy Division at the address specified in § 971.200(b).

§ 971.1005 Observers.

(a) *Purpose of observers.* Each licensee and permittee shall allow, at such times and to such extent as the Administrator deems reasonable and necessary, an observer (as used in this section, the term "observer" means "one or more observers") duly authorized by the Administrator to board and accompany any vessel used by the licensee or permittee in exploration or commercial recovery activities (hereafter referred to in this section as a "vessel"), for the purpose of observing, evaluating and reporting on:

(1) The effectiveness of the terms, conditions, and restrictions of the license or permit;

(2) Compliance with the Act, regulations and orders issued under the Act, and the license or permit terms, conditions, and restrictions; and

(3) The environmental and other effects of the licensee's or permittee's activities under the license or permit.

(b) *Notice to licensee or permittee.* (1) If the Administrator plans to place an observer aboard a vessel, the Administrator will so notify the affected licensee or permittee.

(2) The Administrator normally will issue any such notice as far in advance of placement of the observer as is practicable.

(3) *Contents of notice.* The notice given by the Administrator will include, among other things:

(i) The name of the observer, if known at the time notice is issued;

(ii) The length of time which the observer likely will be aboard the vessel;

(iii) Information concerning activities the observer is likely to conduct, such as:

(A) Identification of special activities that the observer will monitor;

(B) Planned tests of equipment used for monitoring;

(C) Activities of the observer that are likely to require assistance from the vessel's personnel or crew or use of the vessel's equipment; and

(D) Planned tests of alternative operating procedures or technologies for mitigation of environmental effects.

(iv) Information concerning the equipment that will be brought aboard the vessel, such as a description of the monitoring equipment, and any special requirements concerning the handling, storage, location or operation of, or the power supply for, the equipment.

(c) *Initial monitoring period.* The Administrator shall require the placement of an observer on each permittee's mining vessel(s) at least once during the initial year of the permittee's commercial recovery activities.

(d) *Licensee's and permittee's responsibilities for observer placement.* (1) Upon request by the Administrator, a licensee or permittee shall facilitate observer placement by promptly notifying the Administrator regarding the timing of planned system tests and the departure date of the next voyage, or, if the vessel is at sea, suggesting a time and method for transporting the observer to the vessel.

(2) In addition, the licensee or permittee shall notify NOAA of the date of departure of planned cruises 60 days in advance of ship departure from port for purposes of NOAA's determination of whether to place Federal observers onboard. If cruise plans are changed by more than 30 days from the date stated by the exploration or commercial recovery plan, the licensee or permittee shall notify NOAA as soon as such changes are made, or 90 days prior to the previously scheduled departure.

(e) *Duties of licensee, permittee, owner or operator.* Each licensee, permittee, owner or operator of a vessel aboard which an observer is assigned shall:

(1) Allow the observer access to and use of the vessel's communications equipment and personnel when the observer deems such access necessary for the transmission and receipt of messages;

(2) Allow the observer access to and use of the vessel's navigation equipment and personnel when the observer deems such access necessary to determine the vessel's location;

(3) Provide all other reasonable cooperation and assistance to enable the observer to carry out the observer's duties; and

(4) Provide temporary accommodations and food to the observer aboard the vessel which are equivalent to those provided to officers of the vessel.

(f) *Reasonableness of observer activities.* (1) To the maximum extent practicable, observation duties will be planned and carried out in a manner that minimizes interference with the licensee's or permittee's activities under the license or permit.

(2) The Administrator will assure that equipment brought aboard a vessel by the observer is reasonable as to size, weight, and electric power and storage requirements, taking into consideration the necessity of the equipment for carrying out the observer's functions.

(3) The observer will have no authority over the operation of the vessel or its activities, or the officers, crew, or personnel of the vessel. The observer will comply with all rules and regulations issued by the licensee or permittee, and all orders of the Master or senior operations official, with respect to ensuring safe operation of the vessel and the safety of its personnel.

(g) *Non-interference with observer.* Licensees, permittees and other persons are reminded that the Act (see, for example, sections 301(3) and 301(4)) makes it unlawful for any person subject to section 301 of the Act to interfere with any observer in the performance of the observer's duties.

(h) *Confidentiality of information.* NOAA recognizes the possibility that an observer, in performing observer functions, will record information which the licensee or permittee considers to be proprietary. NOAA intends to protect such information consistent with applicable law. The Administrator may in appropriate cases provide the licensee or permittee an opportunity:

(1) To review those parts of the observer's report which may contain proprietary information; and

(2) To request confidential treatment of such information under § 971.802.

§ 971.1006 Proprietary enforcement information.

(a) Proprietary and privileged information seized or maintained under Title III of the Act concerning a person or vessel engaged in commercial recovery will not be made available for general or public use or inspection.

(b) Although presentation of evidence in a proceeding under this subpart is not deemed general or public use of information, the Administrator will, consistent with due process, move to have records sealed, under 15 CFR Part 904 Subpart C, or other applicable provisions of law, in any administrative or judicial proceeding where the use of proprietary or privileged information is required to serve the purpose of the Act.

§ 971.1007 Advance notice of civil actions.

(a) *Actions against alleged violators.* (1) No civil action may be filed in a United States District Court under Section 117 of the Act against any person for alleged violation of the Act, or any regulation, or license or permit term, condition, or restriction issued under the Act, until 60 days after the Administrator and any alleged violator receive written and dated notice of alleged violation.

(2) The notice shall contain:

(i) A concise statement of the facts believed to show a violation;

(ii) A specific reference to the provisions of the Act, regulation or license or permit allegedly violated; and

(iii) Any documentary or other evidence of the alleged violation.

(b) *Action against the Administrator.* (1) No civil action may be filed in a United States District Court under Section 117 of the Act against the Administrator for an alleged failure to perform any act or duty under the Act which is not discretionary until 60 days after receipt by the Administrator of a written and dated notice of intent to file the action.

(2) The notice shall contain:

(i) A specific reference to the provisions of the Act, regulation or permit believed to require the Administrator to perform a nondiscretionary act or duty;

(ii) A precise description of the nondiscretionary act or duty believed to be required by such provision;

(iii) A concise statement of the facts believed to show a failure to perform the act or duty; and

(iv) Any documentary or other evidence of the alleged failure to perform the act or duty.

PART 981—OCEAN THERMAL ENERGY CONVERSION LICENSING PROGRAM

Subpart A—General Program Requirements

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AUTHORITY: Ocean Thermal Energy Conversion Act of 1980, Pub. L. 96-320, 94 Stat. 974 (42 U.S.C. 9101, *et seq.*) as amended by Pub. L. 98-623.

SOURCE: 46 FR 39394, July 31, 1981, unless otherwise noted.

Subpart A—General Program Requirements

§ 981.10 What are the Ocean Thermal Energy Conversion Program Regulations?

(a) *Coverage.* These regulations implement NOAA's responsibilities under the Ocean Thermal Energy Conversion Act of 1980. The regulations provide the procedures and information necessary to apply to NOAA for a license for the ownership, construction, and operation of ocean thermal energy conversion (OTEC) facilities and plantships. They also establish a voluntary consolidated process for review of license applications by NOAA and other Federal, State, and local government entities; state the criteria which will be used for issuance or denial of a license; prescribe criteria for establishing license terms and conditions; prescribe procedures for enforcement of the Act and this part, and for renewal, transfer, modification, revision, suspension, revocation, termination, relinquishment, or surrender of a license.

§ 981.20 Purpose of the OTEC licensing regulations.

The regulations in this part carry out the purposes of the Act, which include:

(a) Authorize and regulate the construction, location, ownership, and operation of OTEC facilities connected to the United States by pipeline or cable, or located in the territorial seas of the United States, consistent with the Convention on the High Seas, and general principles of international law;

(b) Authorize and regulate the construction, location, ownership, and operation of OTEC plantships documented under the laws of the United States, consistent with the Convention on the High Seas and general principles of international law;

(c) Authorize and regulate the construction, location, ownership, and operation of OTEC plantships by United States citizens, consistent with the Convention on the High Seas and general principles of international law;

(d) Establish a legal regime which will permit and encourage the development of OTEC as a commercial energy technology;

(e) Provide for the protection of the marine and coastal environment, and consideration of the interests of ocean users, to prevent or minimize any adverse impact which might occur as a consequence of the development of such OTEC facilities or plantships;

(f) Protect the interests of the United States in the location, construction, and operation of OTEC facilities and plantships; and

(g) Protect the rights and responsibilities of adjacent coastal States in ensuring that Federal actions are consistent with approved State coastal zone management programs and other applicable State and local laws.

§ 981.30 Scope of the OTEC licensing regulations.

(a) *Subpart A* of Part 981 contains definitions and basic procedures related to any application for a license for an OTEC facility or plantship, including application fees and procedures for termination or withdrawal of an application.

(b) *Subpart B* of Part 981 prescribes the information which must be included in a license application to enable the Administrator to make the determinations required by the Act as conditions precedent to issuance or denial of an OTEC license.

(c) *Subpart C* of Part 981 prescribes license application review procedures including the Consolidated Application Review (CAR) process which will be used by NOAA and, on a voluntary basis, by the applicant and those other Federal, State, and local government entities with authority over any aspect of the OTEC operations proposed in an application.

(d) *Subpart D* of Part 981 contains the criteria upon which the Administrator will base the decision to issue or deny an OTEC license, including the criteria which will be used to decide among multiple applications for the same designated application area. This Subpart also prescribes criteria for establishing license terms and conditions, and for renewal, transfer, modification, revision, suspension, revocation, and termination of a license.

(e) *Subpart E* of Part 981 prescribes the procedures which will be used by the Administrator to conduct any formal hearings under this part.

(f) *Subpart F* of Part 981 sets forth the administrative procedures which will be used for enforcement proceedings under the Act and this part.

§ 981.40 Definitions.

For the purposes of this part, the following terms have the following meanings:

Act means the Ocean Thermal Energy Conversion Act of 1980 (Pub.

L. 96-320; 94 Stat. 974; 42 U.S.C. 9101 *et seq.*);

Adjacent coastal State means any coastal State which is required to be designated as such by § 981.330(a) of this part or is designated as such by the Administrator in accordance with § 981.330(b) of this part;

Administrator means the Administrator of NOAA or a person to whom appropriate authority has been delegated;

Affiliate means any person, (a) in which the applicant or licensee owns or controls more than 5% interest, (b) which owns or controls more than 5% interest in the applicant or licensee, or (c) which is under common ownership or control with the applicant or licensee;

Antitrust laws include the Act of July 2, 1890, as amended, the Act of October 15, 1914, as amended, and sections 73 and 74 of the Act of August 27, 1894, as amended;

Application means any application submitted under this part, (a) for issuance of a license for the ownership, construction, or operation of an OTEC facility or plantship; (b) for transfer or renewal of any such license; or (c) for any substantial change in any of the terms and conditions of any such license;

CAR means the Consolidated Application Review process described in subpart C of this part;

Cleanup means removal of pollutants from the water and shorelines or the taking of such other actions as may be necessary to minimize or mitigate damage to the public health or welfare, including, but not limited to, fish, shellfish, wildlife, public and private property, shorelines, and beaches;

Coastal State means a State in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes;

Construction means any activities conducted at sea to supervise, inspect, actually build, or perform other functions incidental to the building, repairing, or expanding of an OTEC facility or plantship or any of its components, including but not limited to, piledriving, emplacement of mooring devices, emplacement of cables and pipelines, and deployment of the cold water pipe, and alterations, modifications, or additions to an OTEC facility or plantship;

Controlling interest means a direct or indirect legal or beneficial interest in or influence over another person arising through ownership of capital stock, interlocking directorates or officers, contractual relations, or other similar means, which substantially affect the independent business behavior of such person;

Designated application area means the projected area or areas in which the OTEC activities of the applicant might impact so as to significantly degrade the operation of another OTEC facility or plantship, and in which the operation of another OTEC facility or plantship might impact so as to significantly degrade the OTEC operation proposed by the applicant;

EIS means an environmental impact statement prepared under section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C));

Facility means an OTEC facility;

Governor means the Governor of a State or the person designated by law to exercise the powers granted to the Governor pursuant to this part;

High seas means that part of the oceans lying seaward of the territorial sea of the United States and outside the territorial sea, as recognized by the United States, of any other nation;

Licensee means the holder of a valid license for the ownership, construction, or operation of an OTEC facility or plantship that was issued, transferred, or renewed pursuant to this part;

Major component means any component of an OTEC facility or plantship with a value exceeding $500,000;

NOAA means the National Oceanic and Atmospheric Administration;

OTEC means ocean thermal energy conversion;

OTEC facility means any facility which is standing, fixed or moored in whole or in part seaward of the high water mark and which is designed to use temperature differences in ocean water to produce electricity or another form of energy capable of being used directly to perform work and includes any equipment installed on such facility to use such electricity or other form of energy to produce, process, refine, or manufacture a product, and any cable or pipeline use to deliver such electricity, fresh water or product to shore, and all other associated equipment and appurtenances of such facility, to the extent they are located seaward of the high water mark. If part of the OTEC facility is located seaward of the high water mark and part on land, the definition includes the entire facility;

OTEC plantship means any vessel which is designed to use temperature differences in ocean water while floating unmoored or moving through such water, to produce electricity or another form or energy capable of being used directly to perform work, and includes any equipment installed on such vessel to use such electricity or other form of energy to produce, process, refine, or manufacture a product, and any equipment used to transfer such product to other vessels for transportation to users, and all other associated equipment and appurtenances of such vessel;

Person means any individual (whether or not a citizen of the United States), any corporation, partnership, association, or other entity organized or existing under the laws of any nation, and any Federal, State, local or foreign government or any entity of any such government;

Plantship means an OTEC plantship;

Pollutant means (a) oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, oil mixed with wastes; (b) dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, temperature change, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal and agricultural waste discharged into water; and (c) hazardous substances as that term is defined in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (Pub. L. 96-510);

Pollutant discharge means, but is not limited to, any spilling, leaking, pumping, pouring, emitting, emptying, or dumping of pollutants;

Significant contract means any contract in an amount exceeding five hundred thousand dollars ($500,000);

State means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the United States Virgin Islands, Guam, the Commonwealth of the Northern Mariana Islands, and any other commonwealth, territory, or possession over which the United States has jurisdiction;

Test platform means any floating or moored platform, barge, ship, or other vessel which is designed for limited-scale, at-sea operation in order to test or evaluate the operation of components or all of an OTEC system and which will not operate as an OTEC facility or plantship after the conclusion of such tests or evaluation; and

United States citizen means (a) any individual who is a citizen of the United States by law, birth, or naturalization; (b) any Federal, State, or local government in the United States, or any entity of any such government; or (c) any corporation, partnership, association, or other entity, organized or existing under the laws of the United States, or of any State, which has as its president or other executive officer and as its chairman of the board of directors, or holder of similar office, an individual who is a United States citizen and which has no more of its directors who are not United States citizens than constitute a minority of the number required for a quorum necessary to conduct the business of the board.

[46 FR 39394, July 31, 1986, as amended at 51 FR 20959, June 10, 1986]

§ 981.50 Who must apply for an OTEC license (and who does not need one)?

(a) *OTEC facilities.* No person may engage in the ownership, construction or operation of an OTEC facility which is:

(1) Documented under the laws of the United States; or

(2) Located in whole or in part between the high water mark and the seaward boundary of the United States territorial sea; or

(3) Connected to any State by pipeline or cable; except in accordance with a license issued pursuant to this part.

(b) *OTEC plantships.* No citizen of the United States may engage in the ownership, construction or operation of an OTEC plantship except in accordance with a license issued pursuant ot this part, or in accordance with a license issued by a foreign nation whose licenses are found by the Administrator, after consultation with the Secretary of State, to be compatible with licenses issued pursuant to this part.

(c) *Activities which do not require a license.* The requirements of this section to obtain an OTEC license do not apply to the following activities:

(1) Ownership, construction, or operation of any ocean thermal energy conversion facility or plantship which the Secretary of Energy has designated in writing as a demonstration project for the development of alternative energy sources for the United States which is conducted by, participated in, or approved by the Department of Energy, for so long as the Secretary of Energy maintains such designation in effect. The Secretary of Energy, after consultation with the Administrator, will require such demonstration projects to abide by as many of the substantive requirements of Title I of the Act as he deems to be practicable without damaging the nature of or unduly delaying such projects;

(2) Ownership, construction, or operation of any test platform which will not operate as an OTEC facility or plantship after conclusion of the testing period;

(3) OTEC construction activities which are conducted on land or in a shipyard; and

(4) Manufacture or supplying of components for construction of an OTEC facility or plantship unless such activity takes place seaward of the high-water mark.

[46 FR 39394, July 31, 1986, as amended at 51 FR 20959, June 10, 1986]

§ 981.60 Federal applications.

The application filed with the Administrator constitutes an application for all Federal authorizations required for ownership, construction, and operation of an OTEC facility or plantship, except for authorizations required by documentation, inspection, certification, construction, and manning laws and regulations administered by the Secretary of the department in which the Coast Guard is operating and application to the Maritime Administration for financial assistance under Title XI of the Merchant Marine Act of 1936. Procedures for review of the application by Federal agencies and departments (other than the Coast Guard) are set forth in Subpart C of this part.

§ 981.70 Pre-application consultation.

(a) *Consultation.* If requested, the Administrator will consult with any prospective applicant to assist the applicant in properly preparing the application and in contacting other Federal and State agencies involved in the application review process to discuss the prospective application.

(b) *Request.* A prospective applicant who wishes a pre-application consultation in accordance with this section should make such request in writing to the Director, Office of Ocean Minerals and Energy, NOAA, Room 410, Page 1 Building, 2001 Wisconsin Avenue, NW., Washington, DC 20235.

§ 981.80 How to apply for an OTEC license.

(a) *Form.* Each application must be in writing and must include the information specified in Subpart B of this part in the order specified.

(b) *Number of copies.* 45 copies of each application must be submitted.

(c) *Where to file the application and all related documents.* Applications and all related documents shall be filed with the Administrator of NOAA, in care of the Director, NOAA Office of Ocean Minerals and Energy, Room 410, Page 1 Building, 2001 Wisconsin Avenue, NW., Washington, DC 20235.

(d) *Signature*—(1) *Who.* Each application for an OTEC license submitted under this part shall be signed by the applicant as follows:

(i) *For a corporation:* By a principal executive officer of at least the level of vice-president;

(ii) *For a partnership or sole proprietorship:* by a general partner or the proprietor, respectively;

(iii) *For a Federal, State, or local government in the United States, or any entity of any such government:* by either a principal executive officer or ranking elected official; or

(iv) *For an association or other entity:* by a principal executive officer.

(2) *Verification.* Each application shall contain a statement at the end of the application subscribed and sworn to before a notary public that the individual who signed the application has read it and that its contents are true to the individual's best knowledge and belief.

§ 981.90 Provision of additional information.

(a) *Supplemental documents.* The Administrator may require, by written notice to the applicant, that the applicant file as a supplement to the application any analysis, explanation or detailing of information in the application or any other information determined by the Administrator to be required to review or process the application.

(b) *Other Federal and State requests.* Any Federal or adjacent coastal State department or agency may file with the Administrator a request or recommendation for further information related to its authorization(s) required for ownership, construction, or operation of the proposed OTEC facility or plantship. Requests and recommendations received by the Administrator within 30 days after notice of the initial application has been published in the FEDERAL REGISTER will be fully considered before any final determination is made to require additional information of the applicant. Requests and recommendations must contain a brief statement of the need for additional information, including the nature of any safety, health, environmental, economic, or other legitimate concerns.

(c) *Time limits.* In exercising the authority to require supplemental information under this section, the Administrator may fix a reasonable time by which an applicant must meet the requirement. If an application states that required information is not yet available but will be furnished at a later date, the Administrator may specify a reasonable time by which the information must be provided. If any requirement is not met by a time fixed in accordance with this paragraph, the Administrator shall determine whether compliance with the requirement is material to processing of the application within the time deadlines prescribed in Subpart C of this part. If the Administrator determines that an unmet requirement for supplemental information is material, the Administrator may disapprove the application or suspend the application pending a determination that processing can be resumed. The period of any suspension shall not be counted in determining the dates of the deadlines prescribed in Subpart C of this part.

(d) *Copies.* 45 copies of additional information required under this section must be submitted unless the Administrator determines otherwise.

§ 981.100 Confidentiality of information.

(a) *Purpose.* This section provides a procedure by which persons submitting information pursuant to this part may request that certain information not be subject to public disclosure.

(b) *Written requests for confidential treatment.* (1) Any person who submits any information pursuant to this part, which information is considered by him to be a trade secret, or commercial or financial information which is privileged or confidential, may request that the information be given confidential treatment.

(2)(i) Any request for confidential treatment of information:

(A) Should be submitted at the time of submission of the information;

(B) Should state the period of time for which confidential treatment is desired (e.g., until a certain date, or until the occurrence of a certain event, or permanently);

(C) Must be submitted in writing; and

(D) Must include the name, mailing address, and telephone number of an agent of the submitter who is authorized to receive notice of requests for disclosure of such information pursuant to paragraph (d) of this section.

(ii) If information is submitted to NOAA without an accompanying request for confidential treatment, the notice referred to in paragraph (d)(2) of this section need not be given. If a request for confidential treatment is received after the information itself is received, NOAA will make such efforts as are administratively practicable to associate the request with copies of the previously submitted information in the files of NOAA and the Federal and State agencies to which NOAA distributed the information. However, NOAA cannot assure that such efforts will be effective, in light of the prior distribution to Federal and State agencies and the possibility of prior disclosure of the information.

(3)(i) Information subject to a request for confidential treatment must be segregated from information for which confidential treatment is not being requested, and each page (or segregable portion of each page) subject to the request must be clearly marked with the name of the person requesting confidential treatment, the name of the applicant or licensee, and an identifying legend such as "Proprietary Information" or "Confidential Treatment Requested." Where this marking proves impracticable, a cover sheet containing the identifying names and legend must be securely attached to the compilation of information for which confidential treatment is requested. Each copy of the information for which confidential treatment has been requested must be cross-referenced to the appropriate section of the application or other document. All information for which confidential treatment is requested pertaining to the same application or other document must be submitted to NOAA in a package separate from that information for which confidential treatment is not being requested.

(ii) Each copy of any application or other document with respect to which confidential treatment of information has been requested must indicate, at each place in the application or document where confidential information has been deleted, that confidential treatment of information has been requested.

(iii) With respect to information submitted as part of an application, forty-five copies of the information for which confidential treatment is requested must be submitted.

(iv) Normally, NOAA will not make a determination as to whether confidential treatment is warranted until a request for disclosure of the information is received. However on a case-by-case basis the Administrator may decide to make a determination in advance of a request for disclosure where it would facilitate NOAA's obtaining voluntarily-submitted information (rather than information required to be submitted under this part).

(c) *Substantiation of request for confidential treatment.* (1) Any request for confidential treatment may include a statement of the basis for believing that the information is deserving of confidential treatment which addresses the issues relevant to a determination whether the information is a trade secret, or commercial or financial information which is privileged or confidential. To the extent permitted by applicable law, part or all of any such statement submitted will be treated as confidential if so requested by the person requesting confidential treatment. Any such statement for which confidential treatment is requested must be segregated, marked, and submitted in accordance with the procedures described in paragraph (b)(3) of this section.

(2) Issues addressed in the statement should include:

(i) The commercial or financial nature of the information;

(ii) The nature and extent of the competitive advantage enjoyed as a result of possession of the information;

(iii) The nature and extent of the competitive harm which would result from public disclosure of the information;

(iv) The extent to which the information has been disseminated to employees and contractors of the person submitting the information;

(v) The extent to which persons other than the person submitting the information possess, or have access to, the same information; and

(vi) The nature of the measures which have been and are being taken to protect the information from disclosure.

(d) *Requests for disclosure.* (1) Any request for disclosure of information submitted, reported or collected pursuant to this part shall be made in accordance with 15 CFR 903.7.

(2) Upon receipt of a request for disclosure of information for which confidential treatment has been requested, the Administrator immediately will issue notice by an expeditious means (such as by telephone, confirmed by certified or registered mail, return receipt requested), of the request for disclosure to the person who requested confidential treatment of the information or to the designated agent. The notice also will:

(i) Inquire whether such person continues to maintain the request for confidential treatment;

(ii) Notify such person of the date (generally, not later than the close of business on the fourth working day after issuance of the notice), by which the person is strongly encouraged to deliver to NOAA a written statement that the person either:

(A) Waives or withdraws the request for confidential treatment in full or in part; or

(B) Confirms that the request for confidential treatment is maintained;

(iii) Inform such person that by such date as the Administrator specifies (generally, not later than the close of business on the fourth working day after issuance of the notice), the person:

(A) Is strongly encouraged to deliver to NOAA a written statement addressing the issues listed in paragraph (c)(2) of this section, describing the basis for believing that the information is deserving of confidential treatment, if such a statement was not previously submitted;

(B) Is strongly encouraged to deliver to NOAA an update of or supplement to any statement previously submitted under paragraph (c) of this section; and

(C) May present to the Administrator, in such forum as the Administrator deems appropriate (such as by telephone or in an informal conference), such person's arguments against disclosure of the information; and

(iv) Inform such person that the burden is on him to assure that any response to the notice is delivered to NOAA within the time specified in the notice.

(3) To the extent permitted by applicable law, part or all of any statement submitted in response to any notice issued under paragraph (d)(2) of this section will be treated as confidential if so requested by the person submitting the response. Any such response for which confidential treatment is requested must be segregated, marked and submitted in accordance with the procedures described in paragraphs (b)(3)(i) and (b)(3)(ii) of this section.

(4) Upon the expiration of the time allowed for response under paragraph (d)(2) of this section, or sooner if authorized under paragraph (e) of this section, the Administrator will determine, in consultation with the NOAA Office of General Counsel, whether confidential treatment is warranted based on the information then available to NOAA.

(5) If the person who requested confidential treatment waives or withdraws that request, the Administrator will proceed with appropriate disclosure of the information;

(6) If the Administrator determines that confidential treatment is warranted, he will so notify the person requesting confidential treatment, and will issue an initial denial of the request for disclosure of records in accordance with 15 CFR 903.8.

(7)(i) If the Administrator determines that confidential treatment is not warranted for part or all of the information, the Administrator immediately will issue notice by an expeditious means (such as by telephone, confirmed by certified or registered mail, return receipt requested), to the person who requested confidential treatment. The notice will state:

(A) The basis for the Administrator's determination;

(B) That the Administrator's determination constitutes final agency action on the request for confidential treatment;

(C) That such final agency action may be subject to judicial review under Chapter 7 of Title 5, United States Code; and

(D) That, except as otherwise provided by paragraph (d)(7)(ii) of this section, on the fourth working day after issuance of the notice described in this paragraph (d)(7)(i) of this section the Administrator will make the information available to the person who requested disclosure unless NOAA has first been notified of the filing of an action in a Federal court to obtain judicial review of the determination, and the court has issued an appropriate order preventing or limiting disclosure.

(ii) The disclosure of information described in paragraph (e) of this section will be subject to the additional standards and procedures for disclosure set forth in that paragraph. For example, the notice under paragraph (d)(2) of this section may be omitted, or the time period allowed for response to that notice may be very short, if the Administrator makes an appropriate determination under paragraph (e)(1) of this section that the delay resulting from following the procedures of paragraph (d) would be detrimental to the public health or safety or the environment.

(8) NOAA will keep a record of the date any notice is issued, and of the date any response is received, by NOAA under paragraph (d) of this section.

(9) In all other respects, procedures for handling requests for records containing information submitted to, reported to, or collected by the Administrator pursuant to this part will be in accordance with 15 CFR Part 903. For example, if 10 working days have passed after the receipt of a request for disclosure and, despite the exercise of due diligence by the agency, the Administrator cannot make a determination as to whether confidential treatment is warranted, the Administrator will issue appropriate notice in accordance with 15 CFR 903.8(b)(5).

(e) *Special limitations on disclosure of certain information.* Any information submitted to, reported to, or collected by the Administrator under this part which is exempt from disclosure pursuant to section 552(b)(4) of Title 5, United States Code (the section of the Freedom of Information Act relating to trade secrets and commercial or financial information which is privileged or confidential), will not:

(1) Be publicly disclosed by the Administrator or by any other officer or employee of the United States, unless the Administrator has:

(i) Determined that the disclosure is necessary to protect the public health or safety or the environment against an unreasonable risk of injury, and

(ii) Notified the person who provided the information 10 working days before the disclosure is to be made, unless the delay resulting from such notice would be detrimental to the public health or safety or the environment, or

(2) Be otherwise disclosed except:

(i)(A) To other Federal and adjacent coastal State government departments and agencies for official use,

(B) To any committee of the Congress of appropriate jurisdiction, or,

(C) Pursuant to court order, and

(ii) When the Administrator has taken appropriate steps to inform the recipient of the confidential nature of the information.

(f) *Direct submissions of confidential information.* If any person (for example, an affiliate) has reason to believe that it would be prejudiced by furnishing information required from it to the applicant or licensee, such person may file the required information directly with NOAA. Information for which the person requests confidential treatment must be segregated, marked, and submitted in accordance with the procedures described in paragraph (b)(3) of this section.

(g) *Protection of confidential information transmitted by NOAA to other agencies.* Each copy of information for which confidential treatment has been requested which is transmitted by NOAA to other Federal and adjacent coastal State government departments and agencies will be accompanied by a cover letter containing:

(1) A request that the other Federal or State department or agency maintain the information in confidence in accordance with applicable law and any applicable protective agreement

entered into by the Administrator and the Federal or State department or agency receiving the information;

(2) A request that the other Federal or State department or agency notify the Administrator immediately upon receipt of any request for disclosure of the information;

(3) A notification that information which is exempt from disclosure under 5 U.S.C. 552(b)(4) (the section of the Freedom of Information Act relating to trade secrets and commercial or financial information which is privileged or confidential) shall not be disclosed except in the limited circumstances provided by section 112 of the Act, and paragraphs (d) and (e) of this section; and

(4) A request that all copies of the information be returned to NOAA for secure storage or disposal promptly after the Federal or State department or agency determines that it no longer needs the information for its official use.

§ 981.110 Amendment of an application.

(a) *Requirement to amend.* If information in an application becomes materially inaccurate or incomplete after it is filed but before the license application proceeding is terminated, the applicant must promptly file an amendment furnishing the corrected or additional information. Forty-five copies of the amendment must be submitted to the Administrator.

(b) *Effect of amendment.* If the administrator determines that any amendment constitutes a major and substantial change to the applicant's original proposal, the Administrator may:

(1) Suspend the time deadlines prescribed in Subpart C of this part for processing of an application pending review of the amendment; or

(2) Require the applicant to commence a new license application proceeding.

§ 981.120 Termination of processing and withdrawal of an application.

(a) An applicant may withdraw an application at any time before the license application proceeding is terminated by delivering or mailing written notice of withdrawal to the Administrator.

(b) The Administrator will terminate a proceeding if:

(1) All applications are withdrawn before the decision approving or denying them is issued; or

(2) The applicant after written notice by the Administrator pursuant to § 981.90 of this part does not provide adequate further information to complete the application within the time fixed in the written notice, and the Administrator elects to disapprove the application under § 981.90(c) of this part.

§ 981.130 Application fee.

(a) *General.* Section 102(h) of the OTEC Act requires each applicant for a license to pay a fee which reflects the reasonable administrative costs incurred by NOAA in reviewing and processing the application.

(b) *Amount.* The applicant must submit the application fee in accordance with the following schedule:

(1) A payment of $100,000 must be submitted with each formal application for issuance of a license.

(2) An additional payment of $100,000 dollars must be submitted prior to the first public hearing held by NOAA on the issuance of the license.

(3) A final payment of $50,000 must be submitted prior to the end of the statutory review period outlined in § 981.360.

(c) *Adjusted costs.* If the costs incurred by NOAA in reviewing and processing the application are significantly in excess of $250,000, the applicant is required to submit the additional payment before issuance of the license. If the costs incurred by NOAA in reviewing and processing the application are significantly less than $250,000, NOAA will refund the difference to the applicant.

(d) *Effect of withdrawal or termination of an application.* If the application is withdrawn or terminated by the Administrator or the applicant prior to a decision on the license application, the applicant is entitled to a refund of the application fee minus those costs incurred by NOAA in reviewing and processing the application up to the date of withdrawal or termination of the application. If the costs are significantly in excess of the amount submitted by the applicant based on the payment schedule in § 981.130(b), then the applicant is required to submit the additional payment to NOAA.

[51 FR 20959, June 10, 1986]

§ 981.140 Clerk, docket, and record of application proceeding.

(a) The mailing address for the clerk in each license application proceeding is: OTEC Docket Clerk, Office of Ocean Minerals and Energy, National Oceanic and Atmospheric Administration, Room 410, Page I Building, 2001 Wisconsin Ave., NW., Washington, DC 20235.

(b) The clerk will maintain a docket and the record for each license application proceeding. The docket will list each document in the record. The record will contain all documents filed or issued in the proceeding that the clerk has received and any other documents in the proceeding that are listed on the docket in accordance with this part.

(c) Comments submitted by Federal agencies and departments on each licensing proceeding will be listed on the docket when they are received. The draft and final environmental impact statements prepared in accordance with § 981.310 of this part will be listed on the docket when they are transmitted to the Environmental Protection Agency.

§ 981.150 Public inspection and copying.

(a) A copy of each application, except information for which confidential treatment is requested (for example, as trade secrets or commercial or financial information which is privileged or confidential), will be available for public inspection and copying at:

(1) NOAA, Office of Ocean Minerals and Energy, Room 410, Page I Building, 2001 Wisconsin Ave., NW., Washington, DC 20235; and

(2) At least one location in each designated adjacent coastal state. The FEDERAL REGISTER notice published under § 981.290, or equivalent public notice, will announce the location.

(b)(1) The Administrator will designate a custodian of all information for which confidential treatment is requested under § 981.100 of this part. The custodian will keep a record of all persons known to have custody of any copy or copies of information which is given confidential treatment.

(2) The custodian will not make public for inspection information for which confidential treatment is requested nor otherwise disclose such information unless the Administrator, after consultation with the NOAA Office of General Counsel, is of the opinion that the applicable requirements of § 981.100 of this part have been satisfied.

§ 981.155 Compliance with Paperwork Reduction Act.

In accordance with 44 U.S.C. 3506(c)(5) and 3512, NOAA hereby informs affected persons that the requests for information under this part requiring:

(a) Submission of specified information with applications; and

(b) Compliance with specific recordkeeping and reporting requirements are subject to the requirements of the Paperwork Reduction Act chapter 35 of Title 44 U.S.C. including 44 U.S.C. 3507 under the Office of Management and Budget approval number 0648-0144.

[46 FR 39394, July 31, 1986, as amended at 51 FR 20960, June 10, 1986]

§ 981.158 Computation of time periods for filing documents.

Saturdays, Sundays and Federal government holidays will be included in computing the time period allowed for filing any document under this part, but when such time period expires on such a day, such time period will be extended to include the next following Federal government work day. Also, with respect to documents filed with the Federal government, filing periods expire at the close of business for the office specified on the day specified.

Subpart B—Information To Be Submitted With Application

§ 981.160 Why is this information required?

(a) *Information for NOAA.* The Act requires the Administrator to make a number of factual determinations with respect to issuance of a license. This subpart prescribes the information which the applicant must provide with the application. If additional information later becomes necessary to enable the Administrator to make those determinations, the Administrator will use the procedures in § 981.90 of this part to obtain it from the applicant.

(b) *Information for other Federal agencies and departments.* The Act requires the Administrator not to issue a license if it is determined that the applicant cannot or will not comply with applicable laws and regulations. This Subpart prescribes information which the applicant must provide with the application to enable the Administrator to make that determination. If additional information later becomes necessary to complete the application proceeding, the Administrator will use the procedures in § 981.90 of this part to obtain it from the applicant.

§ 981.170 Request for use of the Consolidated Application Review (CAR) process.

(a) *Request.* If the applicant wishes to have the CAR process used the application shall so indicate.

(b) *CAR team representative.* If the applicant requests use of the CAR process, the applicant shall designate a representative to the CAR team in his application.

§ 981.180 Information about the applicant and its affiliates.

(a) *General.* The following information on the applicant and its affiliates shall be provided by the applicant with the application:

(1) The name, mailing address, telephone number, citizenship, and the ownership interest in the applicant and its affiliates, of each person having any controlling interest in the applicant or its affiliates or any ownership interest in the applicant or its affiliates of greater than 5 per centum; and

(2) The name, address, and citizenship of any person with whom the applicant and its affiliates have made, or propose to make, a significant contract for the construction or operation of the OTEC facility or plantship, or for any major component of the OTEC facility or plantship, and a copy of such contract.

(b) *Proof of citizenship and authority.* (1) If the applicant is a partnership or sole proprietorship, an affidavit from each partner or the proprietor, respectively, stating that the individual is a citizen of the United States of America.

(2) If the applicant is a corporation, one copy of its charter or instrument by which the corporation is formed and organized under general corporation laws, certified by the Secretary of State or other appropriate authority of the State in which incorporated, a copy of its by-laws certified by its Secretary or an Assistant Secretary, and an affidavit from its president, or holder of similar office, and each member of its board of directors stating the individual's citizenship.

(3) If the applicant is a Federal, State, or local government in the United States, or any entity of any such government, a copy of the laws authorizing the operations detailed in the application.

(4) If the applicant is an association or other entity, a copy of its charter or instrument by which the entity is organized or existing under the laws of the United States, or of any State and an affidavit from its principal executive officer, or holder of similar office, and from each member of its board of directors, stating the individual's citizenship.

(c) *Address for service of documents.* Each application shall contain the name, address and telephone number of a person upon whom service of a notice may be made if a formal hearing is to be held on the application and the name, address and telephone number of a person to whom documents not required to be served may be sent.

(d) *Technical competence.* The following information on the experience of the applicant shall be provided with the application:

(1) A description of the technical competence in offshore operations of the applicant and each consultant, naval architect, or marine engineering firm, if known, that will participate in the design of the OTEC facility or plantship, with particular emphasis on involvement in offshore construction, deployment of large structures, submarine electrical transmission cables, submarine pipelines, seabed foundations, mooring systems, and other experience that would bear on one's qualifications to participate in the construction or operation of an OTEC facility or plantship.

(2) A listing and abstract of each study relied upon by the applicant and a listing and abstract of each ongoing or completed study pertaining to OTEC facilities or plantships conducted by or for the applicant.

(e) *Finances and production.* The following information on the financial situation and production history and plans of the applicant and each of its affiliates shall be provided by the applicant with the application:

(1) The most recent annual financial statement of the applicant and each of its affiliates, including an income statement and a balance sheet, accompanied by an opinion of a certified public accountant;

(2) An estimate of construction costs, by phases;

(3) A detailed estimate of the cost of removal or at sea disposal of all marine components of the OTEC facility or plantship other than electrical transmission cables or pipelines lying below the seabed;

(4) A copy of every agreement or proposal of the applicant and each of its affiliates relating to the ownership, lease, charter, or operation of the OTEC facility or plantship or any of its components and to the financing of the construction or operation of the OTEC facility, plant, or plantship or component thereof, including those relating to production of electricity or other products, capital contributions, loans, guarantees, and commitments therefor; and

(5) From each applicant, and each affiliate of an applicant, engaged in the production of electricity or other product to be produced by the OTEC facility or plantship which is the subject of the application, for each of the three calendar years immediately prior to the date of application, its:

(i) Locations; and

(ii) Total U.S. and total worldwide:

(A) Gross and net production of electricity; and

(B) Production of products of the type which would be produced by the OTEC facility or plantship which is the subject of the application.

§ 981.190 General information on the OTEC facility or plantship.

The following general information shall be submitted with the application in the order specified in this section:

(a) The proposed physical size and location (for a plantship, a description of the area in which the plantship is intended to be operated) of the OTEC facility or plantship, and the intended capacity of such facility or plantship to produce electricity, fresh water, or other products, including an estimate of the total annual gross and net production of electricity or other products;

(b) A description of the thermodynamic cycle and working fluid to be employed by the OTEC facility or plantship;

(c) A description of any production, processing, refining, or manufacturing process which will be used to make a product;

(d) A description of the methods which will be used to deliver electricity, fresh water, or other product to shore;

(e) A general description of the major components of the OTEC facility or plantship; and any pipeline or electrical transmission system or other product transfer system associated with such OTEC facility or plantship;

(f) If construction and deployment is expected to proceed in phases, a description of each phase, including the anticipated date of completion for each phase;

(g) The intended daily volumes of warm and cold water flow through the OTEC facility or plantship;

(h) A description of the procedures to be used in constructing, operating, and maintaining the OTEC facility or plantship, including procedures to be used to control biofouling and to minimize the volume of any Federally permitted pollutant discharge from the OTEC facility or plantship;

(i) A description of the procedures to be used in constructing, operating, and maintaining the OTEC facility or plantship to prevent any unpermitted pollutant discharge; and

(j) An emergency pollutant discharge contingency plan which describes the equipment, training, procedures, and maintenance required to respond to or conduct cleanup of any unpermitted pollutant discharge from the OTEC facility or plantship. (Standards for such a plan and for review of the adequacy of such a plan will be determined by the Coast Guard).

§ 981.200 Requested duration of license.

The applicant shall submit with the application a statement of the requested duration of the license he is seeking, along with the economic, technical, or other basis for the requested duration.

§ 981.210 Compliance with other Federal laws and regulations.

(a) If the proposal of the applicant is subject to regulation under the cited authority, the information specified in this section shall be submitted with the application.

(b) *Clean Water Act.* The information required to be submitted to the Environmental Protection Agency to obtain a *National Pollutant Discharge Elimination System* (NPDES) permit under section 402 of the *Clean Water Act* (Pub. L. 92-500, as amended by Pub. L. 95-217 and Pub. L. 95-576; 33 U.S.C. 1251 *et seq.*). The procedures and information required for such submittals are set out in 40 CFR Part 122, 40 CFR Part 124, and 40 CFR 125.120 *et seq.* In addition, NPDES permits for discharges into marine waters are issued in compliance with guidelines developed by EPA under section 403(c) of the Clean Water Act. For the Ocean Discharge Criteria see 40 CFR Part 125, Subpart M (45 FR 65952; October 3, 1980).

(c) *Clean Water Act.* The information required to be submitted to the Corps of Engineers within the Department of the Army to obtain a *Permit for Discharges of Dredged or Fill Material into Waters of the United States* under section 404 of the *Clean Water Act* (Pub. L. 92-500, as amended by Pub. L. 95-217 and Pub. L. 95-576; 33 U.S.C. 1251 *et seq.*). The procedures and information required for such submittals are set out in 33 CFR Part 320, 33 CFR Part 323, and 33 CFR Part 325.

(d) *Marine Protection, Research, and Sanctuaries Act of 1972.* The information required to be submitted to the Corps of Engineers within the Department of the Army to obtain a *Permit for Ocean Dumping of Dredged Material* under section 103 of the *Marine Protection, Research, and Sanctuaries Act of 1972,* as amended (33 U.S.C. 1413). The procedures and information required for such submittals are set out in 33 CFR Part 320, 33 CFR Part 324, and 33 CFR Part 325.

(e) *River and Harbor Act of 1899.* The information required to be submitted to the Corps of Engineers within the Department of the Army to obtain a *Permit for Structures or Work in or Affecting Navigable Waters of the United States* under section 10 of the *River and Harbor Act of 1899,* 33 U.S.C. 403. The procedures and information required for such submittals are set out in 33 CFR Part 320, 33 CFR Part 322, and 33 CFR Part 325.

(f) *Endangered Species Act of 1973.* The information required to determine whether the activities of the OTEC facility or plantship are likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of their critical habitats, as determined under the *Endangered Species Act of 1973* (16 U.S.C. 1531 *et seq.*). For the lists of endangered species, see 50 CFR Parts 17 and 222; for the lists of threatened species, see 50 CFR Parts 17 and 227; for the lists of designated critical habitats, see 50 CFR Parts 17 and 226.

(g) *Coastal Zone Management Act of 1972.* The certification or certifications required to be submitted to NOAA under section 307(c) of the *Coastal Zone Management Act of 1972* (CZMA) (16 U.S.C. 1456(c)). The procedures and information required for such submittals are set out in 15 CFR Part 930.

(h) *Outer Continental Shelf Lands Act Amendments of 1978.* The information required to be submitted to the Corps of Engineers within the Department of the Army to obtain a *Permit for Artifical Islands, Installations, and Other Devices, Installed on the Outer Continental Shelf, which May Obstruct Navigation,* under section 4(e) of the *Outer Continental Shelf Lands Act* (16 U.S.C. 203(e)). The procedures and information required for such submittals are set out in 33 CFR Part 322.

(i) *Clear Air Act.* The information required to be submitted to a State or to the Environmental Protection Agency to determine compliance with the *Clean Air Act* (42 U.S.C. 7401 *et seq.*). The procedures and information required for such submittals are set out in 40 CFR Parts 50–87.

(j) *Fish and Wildlife Coordination Act (FWCA).* Information to assist NOAA in complying with the consultation requirements of the FWCA (16 U.S.C. 661 *et seq.;* in particular, section 662), with a view to the conservation of fish and wildlife resources by planning and incorporating measures to prevent loss of and damage to such resources. NOAA strongly encourages each applicant to contact NOAA at the pre-application stage of the project, to facilitate early consultation with the National Marine Fisheries Service, the U.S. Fish and Wildlife Service and State agencies administering affected wildlife resources.

(k) *Additional Federal authorizations required.* All other applications for Federal authorizations required for ownership, construction, location, and operation of the proposed OTEC facility or plantship not listed elsewhere in this part.

[46 FR 39394, July 31, 1981; 47 FR 31861, July 23, 1982]

§ 981.220 OTEC site information.

(a) *General.* The following information on the proposed OTEC facility site or proposed OTEC plantship operating site(s), as appropriate, shall be submitted with an application.

(b) *Site plan.* Single-line drawings and descriptions showing the location and type of each major component and appurtenance of the proposed OTEC facility or plantship, including floating structures, fixed structures, electrical power transmission cables, aids to navigation, industrial process systems, offshore and onshore pipelines, electrical substations and switching stations. One of these drawings must be a large-scale nautical chart of the area in which the proposed OTEC facility or plantship would operate.

(c) *Existing human uses.* Single-line drawings of the marine area within five miles of the proposed site showing the nature and location of any cables, pipelines, offshore drilling or production platforms, aids to navigation, sewage outfalls, or other man-made structures and equipment. These drawings must also show the boundary lines and identification of each Outer Continental Shelf lease block, shipping lane, submarine transit lane, fishing ground, national defense restricted area, or other special area noted on navigation charts for the area covered by the drawings, or otherwise known to the applicant. The information required in § 981.260(a)(7) and (a)(8) of the part must also be included on these drawings.

(d) *Marine components.* A description of:

(1) The proposed size and location of:

(i) All fixed and floating structures associated with the OTEC facility or plantship;

(ii) In the case of a moored OTEC facility, watch circles;

(iii) Maneuvering areas;

(iv) Recommended ships' routing measures considered necessary or appropriate for the protection of the OTEC facility or plantship;

(v) Recommended anchorage areas, if any;

(vi) Recommended mooring area for support vessels;

(vii) Pipelines and cables within the marine site;

(2) The water depth throughout the proposed marine site.

(3) In the case of an OTEC facility, a reconnaissance hydrographic survey of the proposed marine site.

NOTE: A requirement to submit an engineering hydrographic survey of the final marine site for an OTEC facility will be imposed as a license condition.

(e) *Soil data.* For an OTEC facility, an analysis of the general character and condition of the ocean bottom and sub-bottom strata throughout the marine site and along the path of any cold or warm water intake or discharge piping, electrical transmission cable, or pipeline to the shore, including an opinion by a registered professional engineer with appropriate expertise and training, concerning:

(1) The suitability of the ocean bottom and sub-bottom strata to accommodate the anticipated design load of each marine component that will be fixed to or supported on the ocean floor as evidenced by foundation tests, geo-hazard reports, and geotechnical reports; and

(2) The stability of the seabed when exposed to the environmental forces resulting from severe storms, or to lesser forces that continue for an extended period, including any history of accretion or erosion of the coast line in proximity to the marine site.

(f) *Onshore components.* A description of the size and location of major onshore components of the OTEC facility, including:

(1) Onshore electrical transmission cables or pipelines;

(2) Electrical substations;

(3) Switching stations;

(4) Electrical transmission lines;

(5) Storage facilities;

(6) Industrial plants; and

(7) Vessel on/off loading facilities.

§ 981.230 Operational information.

(a) Each applicant shall specify the wind, wave, and current conditions during which the licensee would initiate the following actions:

(1) Shutdown of electrical power or other product production operations.

(2) Prohibition on supply vessels or product transport vessels mooring to an OTEC facility or plantship.

(3) Shutdown of all operations and evacuation of the OTEC facility or plantship.

(b) Each application shall contain a description of the calculations and other information used to specify the conditions described in paragraph (a) of this section.

(c) Each application shall contain a description of the procedures to be followed in shutdown and evacuation of the facility or plantship under the conditions described in paragraph (a) of this section.

(d) Each application shall state the personnel capacity of the OTEC facility or plantship.

§ 981.240 Design information.

(a) The applicant shall submit the design information specified in this section with his application.

(b) *Major floating components data.* (1) A description and preliminary design drawing of each major floating component, including any electrical transmission riser cable, product transfer system, cold and warm water intake and discharge structures, or cold water pipe suspension system if they are floating systems in whole or in part, along with any floating anchoring or securing structure.

(2) The design criteria to which each major floating component is to be designed and built.

(3) The design standards and codes to be used.

(4) The title of each recommended engineering practice to be followed.

(5) A description and the results of any design and evaluation studies performed by or for the applicant on a major floating component.

(6) A description of safety, lifesaving, and firefighting equipment to be used on each major floating component.

(c) *Major fixed marine components.* (1) A description and preliminary design drawing of each major fixed marine component, including cold and warm water intake and discharge structures, if they are fixed marine components in whole or in part.

(2) The design criteria to which each major fixed marine component is to be designed and built.

(3) The design standards and codes to be used.

(4) The title of each recommended engineering practice to be followed.

(5) A description and the results of any design and evaluation studies performed by or for the applicant for any major fixed marine component and utilized in the development of the application.

(6) A description of safety, lifesaving, and firefighting equipment to be used on each major fixed marine component.

(d) *Major onshore components.* (1) A description and preliminary design drawing of each major onshore component.

(2) A description and the results of any design and evaluation studies performed by or for the applicant for any major onshore component and used in development of the application.

(3) A description of the safety and firefighting equipment to be used in each major onshore component.

(e) *Offshore electrical transmission cable or pipeline components.* (1) A description and preliminary design drawing of any submarine electrical transmission cable or pipeline, including size, capacity, length, depth and protective devices.

(2) The design criteria to which the submarine electrical transmission cable or pipeline is to be designed and built.

(3) The design standards and codes to be used.

(4) The title of each recommended engineering practice to be followed.

(5) A description of the manner in which all submerged or buried communications cables, electrical transmission cables, and pipelines will be crossed by the offshore submarine electrical transmission cable or pipeline.

(f) *Miscellaneous components data.* (1) A description of the navigation safety equipment required under 33 CFR Part 164 for a plantship.

(2) A description of aids to navigation to be established on the OTEC facility in accordance with 33 CFR Part 64 and 33 CFR Part 66.

(3) A description of the proposed navigational lighting for the OTEC plantship in accordance with the International Regulations for Prevention of Collisions at Sea, 33 CFR Part 87.

(4) A description of the radio stations or other communications facilities and the proposed method of operation to serve the OTEC facility or plantship during construction and operation, including systems to communicate with transient shipping for safety at sea.

NOTE: Federal Communications Commission applications for the OTEC facility or plantship may be submitted directly to the Federal Communications Commission when sufficient technical information is available to meet the rules of that agency. The holding of appropriate Federal Communications Commission licenses will be made a condition on each OTEC facility or plantship license.

(5) A description of plans and methods of operating vessels supplying, or transporting products from, the OTEC facility or plantship.

(6) Type, size and number of vessels to be used in supplying or transporting products from the OTEC facility or plantship.

(7) A description and exact location of any shore-based support facilities to be provided for vessels described in paragraphs (f)(5) and (f)(6) of this section.

§ 981.250 Construction and deployment procedures.

A description of the locations, methods and procedures to be used in constructing and deploying each major marine component of the OTEC facility or plantship must be submitted. This description must include an explanation of the method for emplacing any submarine electrical transmission cable.

§ 981.260 Environmental information.

(a) The following environmental information and assessments shall be provided with the application:

(1) A description of the area or areas of the ocean and their boundaries, in which the OTEC activities of the applicant might impact so as to significantly degrade the operation of another OTEC facility or plantship, and in which the potential operation of another OTEC facility or plantship

might impact so as to significantly degade the OTEC operation proposed by the applicant;

(2) An assessment of the quantities, composition and potential for bioaccumulation or persistence of any pollutants which may be discharged into the water or atmosphere from the facility or plantship;

(3) An assessment of the potential transport of such pollutants by biological, physical or chemical processes;

(4) An assessment of the composition and vulnerability of the biological communities which may be affected by entrainment, impingement, or by such pollutants, including the presence of unique species or communities of species, the presence of species identified as endangered or threatened pursuant to the Endangered Species Act, the presence of species of marine mammals, or the presence of those species critical to the structure or function of the ecosystems, such as those important for the food chain;

(5) An assessment of the potential impacts on human health of such pollutants through direct and indirect pathways;

(6) An assessment of the importance of the receiving water area and atmosphere to the surrounding biological community, including the presence of spawning sites, nursery/forage areas, migratory pathways, or areas necessary for other functions or critical stages in the life cycle of an organism;

(7) A description of special sites which might be impacted by the proposed OTEC operations including, but not limited to, estuarine or marine sanctuaries and refuges, parks, national and historic monuments, archeological resources, national seashores, wilderness areas and coral reefs, and an assessment of the potential significance of such impacts. The location of these sites must be included on the drawings required by § 981.220(c) of this part;

(8) A description of existing or potential recreational and commercial fishing areas, including finfishing and shellfishing areas, which might be significantly impacted by the proposed OTEC operation. The locations of these areas must be included on the drawings required by § 981.220(c) of this part;

(9) A description of expected meteorological and climatic conditions in the area(s) described in paragraph (a)(1) of this section, including estimates of the frequency and severity of extreme meteorological events;

(10) For an OTEC facility, a description of the seismological conditions at the proposed site, including estimates of the frequency and severity of extreme seismological events;

(11) A description of the physical oceanographic conditions in the area(s) described in paragraph (a)(1) of this section, including surface and subsurface currents, density gradients and tides;

(12) A description of the environmental monitoring program proposed by the applicant to:

(i) Demonstrate compliance with applicable Federal, State, or other pertinent air and water quality standards;

(ii) Provide for early detection of potential releases of pollutants from the OTEC facility or plantship; and

(iii) Monitor the effects of cold and warm water intakes and of discharges from the OTEC facility or plantship on air, water, sediment, and biological quality. Note that numerical limits for conventional, non-conventional, and toxic pollutants for marine waters are identified in the Environmental Protection Agency publication *Quality Criteria for Water* (the "Red Book"), and in water quality criteria for toxic pollutants set out in 45 FR 79318-79370, November 28, 1980.

(b) A description and the results of any study or evaluation used by the applicant to develop the information and assessments required by this section must be submitted with the application.

Subpart C—License Application Review Procedures

§ 981.270 What is the license application review process?

This subpart describes the process which is used by NOAA to review an application for an OTEC license. The Act prescribes certain mandatory steps in the process and establishes deadlines for their completion. The mandatory steps in the license application review process are set out first in this subpart in §§ 981.280 through 981.370. NOAA has also developed a voluntary Consoldiated Application Review (CAR) process which will be used by NOAA and, on a voluntary basis, by other involved Federal, State, and local government entities, to coordinate reviews associated with all Federal, State, and local government authorizations required for ownership, construction, and operation of an OTEC facility or plantship. The steps in the CAR process are set out in this subpart after the mandatory review procedures, beginning at § 981.380.

§ 981.280 NOAA review for completeness.

(a) Within 21 days after the receipt of an application, the Administrator will determine whether the application appears to contain all of the information required by Subpart B of this part. In making this determination the Administrator will consult with other involved Federal agencies and departments.

(b) If the Administrator determines that such information appears to be contained in the application, the Administrator will take the actions under § 981.290 of this part.

(c) If the Administrator determines that all of the required information does not appear to be contained in the application, the Administrator will notify the applicant in accordance with § 981.90 of this part. The Administrator may decide to take no further action with respect to processing the application until such deficiencies have been remedied.

(d) The time limitations of this Subpart do not begin to run until the date on which the Administrator determines under paragraph (b) of this section that the application appears to be complete.

§ 981.290 Publication of notice of application; contents of notice; call for additional applications for OTEC facilities.

(a) Not later than 5 days after determining under § 981.280 of this part that an application appears to be complete, the Administrator will publish notice of receipt of the application, together with a summary of the plans specified in the application, in the FEDERAL REGISTER.

(b) In the case of an application for an OTEC facility the published notice also will include:

(1) A description of the designated application area encompassing the proposed OTEC facility, and within which:

(i) The OTEC activities proposed by the applicant might impact so as to significantly degrade the operation of another OTEC facility; and

(ii) The potential operation of another OTEC facility might impact so as to significantly degrade the OTEC operation proposed by the applicant;

(2) A call for submission of any other applications for licenses for the ownership, construction, and operation of an OTEC facility within the designated application area.

(c) Any person intending to file an application referred to in paragraph (b)(2) of this section shall submit a notice of intent to file an application to the Administrator not later than 60 days after the publication of notice pursuant to paragraph (a) of this section, and shall submit the completed application no later than 90 days after publication of such notice. No application for a license for the ownership, construction, and operation of an OTEC facility within the designated application area for which a notice of intent to file was received after such 60-day period, or which is received after such 90-day period has elapsed, shall be considered until action has been completed on all timely filed applications pending with respect to such application area.

(d) Not later than 5 days after determining under § 981.280 of this part that an application submitted in accordance with paragraph (c) of this section appears to be complete, the Administrator will publish notice of receipt of the application, together with a summary of the plans specified in the application, in the FEDERAL REGISTER. The notice will also contain a description of the application area described in the original notice published by the Administrator for that area under paragraph (b) of this section.

(e) If additional applications for a designated application area are received pursuant to paragraph (c) of this section, the original applicant and all subsequent applicants for licenses in the designated application area shall submit the following information not later than 30 days after expiration of the 90-day period provided for in paragraph (c) of this section:

(1) Projections or estimates of the unit cost to the end user of produced electricity or product during the first, third, sixth, ninth, etc., year of operation throughout the requested duration of the OTEC facility license; and

(2) An estimate of the amount of fuel or other raw materials which would be saved or made available for other uses because of the operation of the OTEC facility, projected on an annual basis through the expected useful life of the OTEC facility.

The estimates provided under this paragraph should be supported by an analysis of the specific markets in which the OTEC facility would compete.

§ 981.300 Other Federal agencies and departments.

(a) At the time notice of any application is published pursuant to § 981.290 of this part, the Administrator will forward a copy of such application to those Federal agencies and departments with jurisdiction over any aspect of OTEC facility or plantship ownership, construction, or operation for review, comment, and recommendation as to license conditions and for such other action as may be required by law. The Federal agencies involved shall include, but are not limited to, the Environmental Protection Agency and the Departments of Energy, Transportation, State, the Interior, Justice and Defense.

(b) Each Federal agency or department involved (other than the Department of Justice, which shall conduct its review in accordance with § 981.320 of this part) shall review the application and, based upon legal considerations within its area of responsibility, recommend to the Administrator the approval, approval subject to conditions, or disapproval of the application not later than 45 days after public hearings are concluded pursuant to this part. In any case in which an agency or department recommends disapproval, it shall set forth in detail the manner in which the application does not comply with any law or regulation within its area of responsibility and shall notify the Administrator of the manner in which the application may be amended or the license conditioned so as to bring it into compliance with the law or regulation involved.

(c) In addition to the requirements of paragraph (b) of this section, each Federal agency or department is strongly encouraged to conduct its review of the application and to make its initial or tentative recommendation of approval or denial to the Administrator before public hearings begin under § 981.340 of this part, so that the public hearings can address those tentative recommendations. The NOAA Administrator will also attempt to make his preliminary views on the application and possible license terms and conditions available before the first public hearing is held under § 981.340 of this part.

§ 981.310 EIS for each application.

(a) *General.* (1) The issuance of any license for ownership, construction, and operation of an OTEC facility or plantship will be deemed to be a major Federal action significantly affecting the quality of the human environment for purposes of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4332(2)(C)).

(2) Whether other actions concerning a license, such as transfer or renewal of the license, require full EIS procedures will be determined on a case-by-case basis in accordance with NEPA.

(b) *NOAA as lead agency.* For all timely applications covering proposed OTEC facilities in a single application area, and for each application relating to a proposed OTEC plantship, the Administrator will, pursuant to section 102(2)(C) of NEPA and in cooperation with other involved Federal agencies and departments, prepare a single EIS which will fulfill the requirements of all Federal agencies in carrying out their responsibilities pursuant to the Act to prepare an EIS.

§ 981.320 Antitrust review.

(a) Promptly after determining under § 981.280 of this part that an application appears to be complete, the Administrator will transmit to the Attorney General a complete copy of such application.

(b) Within 90 days after receipt of the application under § 981.300(a) of this part, the Attorney General shall conduct such antitrust review of the application as he deems appropriate, and submit to the Administrator, in writing, any advice or recommendations he deems advisable to avoid any action upon such application by the Administrator which would create a situation inconsistent with the antitrust laws.

(c) The Administrator will not issue the license during the 90-day period, except upon written confirmation by the Attorney General that he does not intend to submit any further advice or recommendation on the application during such period.

(d) If the Attorney General fails to file such views within the 90-day period, the Administrator will proceed as if such views had been received.

(e) If the Administrator decides to issue the license even though the Attorney General has recommended against it, or to issue the license without terms and/or conditions recommended by the Attorney General, the Administrator will inform the Attorney General in writing of the reasons for such a decision.

§ 981.330 Adjacent coastal States.

(a) *Automatic designation.* (1) The Administrator will designate as an "adjacent coastal State" any coastal State:

(i) Which would be directly connected by electric transmission cable or pipeline to an OTEC facility as proposed in an application;

(ii) In whose waters any part of such proposed OTEC facility would be located; or

(iii) In whose waters an OTEC plantship would be operated as proposed in an application.

(2) The Administrator will announce the designation of an adjacent coastal State under paragraph (a)(1) of this section in the notice of application published in the FEDERAL REGISTER under § 981.290 of this part.

(b) *Other designation.* (1) The Administrator will, upon request of a State, designate such State as an "adjacent coastal State" if he determines:

(i) That there is a risk of damage to the coastal environment of such State equal to or greater than the risk posed to a State required to be designated as an "adjacent coastal State" by paragraph (a)(1) of this section, or

(ii) that the proposed OTEC activities of the applicant are likely to impact at possible locations for OTEC facilities which could reasonably be expected to be directly connected by electric transmission cable or pipeline to such State, so as to significantly degrade OTEC operations at such possible locations.

(2) Any State requesting designation as an "adjacent coastal State" under paragraph (b)(1) of this section must make its request to the Administrator, in writing, not later than the 14th day after the date of publication of notice of application for a proposed OTEC facility or plantship in the FEDERAL REGISTER under § 981.290 of this part. The request must be signed by the Governor of the requesting State, and must specify in detail the reasons why the State believes the Administrator should make a determination under paragraph (b)(1) of this section.

(3) The Administrator will make any designation required by paragraph (b)(1) of this section not later than the 45th day after the date he receives such a request from a State.

(c) *Transmittal of application; "Federal Register" notice.* Not later than 5 days after the designation of an adjacent coastal State pursuant to this section, the Administrator will transmit a complete copy of the application to the Governor of such State, and publish notice of the designation in the FEDERAL REGISTER.

(d) *Consultation with adjacent coastal States with approved Coastal Zone Management programs on license conditions.* (1) The Administrator will not issue a license without consultation with the Governor of each adjacent coastal State which has an approved Coastal Zone Management (CZM) program in good standing pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 *et seq.*).

(2)(i) If the Governor of a State referred to in paragraph (d)(1) of this section determines that an application is inadequate or inconsistent in some respect with the State's CZM program or other applicable State or local laws, the Governor may so notify the Administrator, including the following information:

(A) The part of the State's CZM program, or the other applicable State or local law, with respect to which the application is inadequate or inconsistent;

(B) The manner in which or reason why the application is inadequate or inconsistent; and

(C) How the application may be amended, or the license conditioned, so as to make activities conducted under the license consistent with the State's CZM program and other applicable State and local laws.

(ii) Any notice given to the Administrator by a Governor under paragraph (d)(2)(i) of this section must be in writing, and must contain the information described in paragraphs (d)(2)(i)(A) through (C) of this section.

(3) If the Governor of a State referred to in paragraph (d)(1) of this section has not transmitted his approval, or disapproval under paragraph (d)(2) of this section, to the Administrator by the 45th day after public hearings on the application are concluded under this part, his approval shall be conclusively presumed.

(4) Upon timely receipt of notice from a Governor under paragraph (d)(2) of this section, the Administrator will condition any license granted to make activities conducted under the license consistent with the State's CZM program and other applicable State and local laws. If a license cannot be so conditioned, the Administrator will not issue the license.

(e) *Consideration of views of other States.* Any adjacent coastal State which does not have an approved CZM program in good standing, and any other interested State, will have the opportunity to make its views known in writing to, and to have them given full consideration by, the Administrator regarding any application for a license for the ownership, location, construction, or operation of an OTEC facility or plantship.

(f) *Tentative recommendations.* In addition to the provisions of paragraphs (d) and (e) of this section, each adjacent coastal State is strongly encouraged to conduct its review of the application and to make its initial or tentative recommendations to the Administrator before public hearings begin under § 981.340 of this part, so that the public hearings can address those tentative recommendations.

§ 981.340 Informal public hearings on license application.

(a) *General.* (1) A license may be issued only after public notice, opportunity for comment, and public hearings in accordance with this part.

(2) Hearings held under this part will be consolidated insofar as practicable with hearings held by other agencies.

(b) *Multiple applications for OTEC facilities.* If two or more license applications for OTEC facilities have been filed for the same designated application area, the Administrator will consolidate the hearings on the applications.

(c) *Location.* With respect to each license application, at least one public hearing will be held in the District of Columbia and in any adjacent coastal State in which an OTEC facility which is the subject of the application is proposed to be located or to which it would be directly connected by pipeline or electric transmission cable.

(d) *Notice of public hearing.* After all applications in a proceeding are filed, the Administrator will publish a notice of public hearing in the FEDERAL REGISTER and mail or deliver a copy of the notice to any person who requests it and to each applicant and to the Governor of each adjacent coastal State. Each notice will list the applicant(s), state the time and place for the hearing, and describe any factual issues in the proceeding. A notice may prescribe procedural matters to govern the hearing, may designate the presiding officer assigned by the Administrator for the hearing, and may contain such other information as the Administrator determines may facilitate the conduct of the hearing.

(e) *Participation by interested persons.* Interested persons may attend any public hearing, present relevant material at the hearing, and submit written material and oral statements during the hearing at a time and in a manner determined by the presiding officer.

(f) *Report of public hearing.* Within 21 days after a public hearing is completed, the presiding officer will prepare a report of the hearing. The report at a minimum will contain a summary of the materials presented and factual issues raised at the hearing and will have attached to it a transcript of the hearing and all relevant written materials submitted to the presiding officer.

§ 981.350 Formal hearings on material factual issues.

(a) If, on the basis of the hearing report required by § 981.340 of this part, the Administrator determines that there exists one or more specific and material factual issues which must be resolved by a formal evidentiary hearing, the Administrator will issue a notice of formal hearing under § 981.560(d) of this part.

(b) If the Administrator determines under paragraph (a) of this section that a formal hearing is necessary, at least one adjudicatory hearing will be held in the District of Columbia in accordance with 5 U.S.C. 554 and the procedures set forth in Subpart E of this part. The record developed in any such adjudicatory hearing will be part of the basis for the Administrator's decision to approve or deny a license.

§ 981.360 Timely conclusion of public hearings.

(a) All public hearings on all applications with respect to OTEC facilities for any designated application area will be concluded not later than 240 days after notice of the initial application has been published under § 981.290 of this part.

(b) All public hearings on applications with respect to OTEC plantships will be concluded not later than 240 days after notice of the application has been published pursuant to § 981.290 of this part.

(c) Upon conclusion of all public hearings with respect to an OTEC license application under this part, the Administrator will publish a notice in the FEDERAL REGISTER stating that all such public hearings have been concluded and specifying the date by which recommendations or notice must be submitted under §§ 981.300(b) and 981.330(d)(3) of this part.

§ 981.370 Timely issuance of draft and final EIS's on the application.

(a) *Draft EIS.* Each draft EIS relating to proposed OTEC facilities or plantships will be prepared and issued within 180 days after notice of the initial application has been published pursuant to § 981.290 of this part.

(b) *Final EIS.* Each final EIS shall be issued not later than 90 days following the date on which public hearings are concluded pursuant to § 981.360 of this part.

(c) *Extension of time periods.* The Administrator may extend the deadlines specified in paragraphs (a) and (b) of this section for issuance of a specific draft or final EIS to a later specified date if the Administrator notifies the applicant in writing and describes the good cause for such extension.

§ 981.380 Steps in the voluntary Consolidated Application Review (CAR) process.

(a) The voluntary CAR process, which supplements the preceding mandatory steps in this subpart, includes the following procedures:

(1) Early designation of a representative from each participating Federal, State, and local government entity, as well as each OTEC license applicant, to serve as members of the Consolidated Application Review (CAR) team;

(2) Development and signing of a Joint Agreement among the participating Federal, State, and local government entities and each applicant. The Joint Agreement identifies the

members of the CAR team, details the regulatory and review responsibilities of each participating government agency having jurisdiction over any aspect of the construction or operation of OTEC facilities or plantships, and outlines the responsibilities of each applicant in the CAR process;

(3) Conducting an inter-agency meeting with all members of the CAR team which includes a briefing by each applicant on the details of each proposed OTEC facility or plantship, and a briefing by the government members on the procedures to be used in processing all necessary permits, authorizations, and approvals; and

(4) Implementation of the CAR schedule, including completion of required regulatory reviews, conduct of necessary public hearings, preparation of an Environmental Impact Statement, and other CAR team activities necessary to ensure close coordination of the OTEC license review process.

§ 981.390 Voluntary nature of the CAR process.

(a) *Applicant.* Participation by each applicant in the CAR process is voluntary. If an applicant desires to have the application processed by the CAR process the application shall so indicate and shall contain a designation of a CAR team representative.

(b) *Other Federal, State, and local government entities.* Participation by other Federal, State, and local government entities in the CAR process is voluntary. If an applicant indicates a desire to use the CAR process, NOAA will contact other Federal, State, and local government entities with expertise concerning, or jurisdiction over, any aspect of the construction or operation of the OTEC facility or plantship proposed by the applicant and invite them to designate a representative to serve on the CAR team for that application.

(c) *Other application review agreements.* Agreements other than the Joint Agreement may, at the option of the affected parties, be negotiated between any applicant and individual regulatory agencies, or between regulatory agencies, regarding any aspect of the regulatory reviews necessary pursuant to any government permit, license, or authorization required for construction or operation of the OTEC facility or plantship which is the subject of the application. Such agreements may be negotiated before or after an application for an OTEC license is submitted to NOAA. Such agreements will not be affected by an applicant's later decision to use the CAR process.

§ 981.400 Effect of Joint Agreement on authorities.

Nothing in the Joint Agreement developed by the CAR team shall abrogate the statutory, regulatory, or administrative responsibilities and rights of any party, agency, or jurisdiction. The CAR agreement is voluntary, and all parties will, in good faith, work in a cooperative and coordinated fashion to carry out the responsibilities stated therein.

§ 981.410 Request for designation of Federal CAR team members.

Not later than the time the Administrator forwards copies of the application to other Federal agencies and departments pursuant to § 981.300 of this part, the Administrator will request that each such agency and department designate a representative to serve on the CAR team for the application, if the applicant has requested that the CAR process be used for application review. Such Federal agencies and departments will be requested to make CAR team member designations within 14 days of receipt of the Administrator's request.

§ 981.420 Request for designation of State and local CAR team members.

(a) *State members.* Not later than the time the Administrator forwards copies of the application to designated adjacent coastal States pursuant to § 981.330 of this part, the Administrator will request that each such adjacent coastal State designate a representative to serve on the CAR team for the application, if the applicant has requested that the CAR process be used for review of the application. Such designated adjacent coastal States will be requested to make CAR team member designations within 14 days of receipt of the Administrator's request.

(b) *Local government members.* The request from the Administrator pursuant to paragraph (a) of this section will include a request that the designated adjacent coastal State coordinate with affected local government entities within such State to assist such entities in designating CAR team members to serve on the CAR team for the application. Such designated adjacent coastal States will be requested to forward local government CAR team member designations to the Administrator within 14 days of receipt of the Administrator's request.

§ 981.430 Development of Joint Agreement by CAR team.

(a) *Schedule.* Within 45 days after all members of the CAR team for the application are designated pursuant to this part, the CAR team will develop and sign a Joint Agreement among the participants.

(b) *Content.* The Joint Agreement will include, as a minimum:

(1) An identification of all members of the CAR team;

(2) A statement of the regulatory and review responsibilities of each government entity represented on the CAR team;

(3) A statement of the responsibilities of the representative of each applicant during the CAR process to be conducted on the application;

(4) A schedule of meetings, hearings, and decisions which must be completed during the CAR process; and

(5) A brief description of the OTEC facility or plantship proposal which is the subject of the application.

(c) *Availability.* After the Joint Agreement is completed and signed by CAR team participants, it will be listed on the docket and made a part of the record of the application proceeding in accordance with § 981.140 of this part. The Joint Agreement will then be available for public inspection and copying in accordance with § 981.150 of this part.

§ 981.440 Inter-agency CAR team meeting.

(a) *Schedule.* After completion of the Joint Agreement and prior to any public hearing on the application required by the Act, the CAR team will hold an initial public meeting. If practicable, the meeting will be held in an adjacent coastal State designated as such under § 981.330 of this part.

(b) *Content.* The inter-agency CAR team meeting will consist of a briefing by each applicant on the details of the proposed OTEC facility or plantship and briefings by each government member of the CAR team on the procedures to be used in processing all necessary permits, authorizations, and approvals.

(c) *Public participation.* Interested persons may attend the inter-agency CAR team meeting, present relevant material, and submit written and oral statements at a time determined by the presiding officer.

§ 981.450 Implementation of the CAR schedule.

(a) *Cooperation.* All members of the CAR team will, in good faith, work in a cooperative and coordinated fashion to address the responsibilities stated in the Joint Agreement and to assure that the schedule in the Joint Agreement is adhered to.

(b) *Delays.* All parties to the Joint Agreement will make good faith efforts to adhere to the schedule agreed to therein. However, if unavoidable delays occur in submittal and review of information during the CAR process, the CAR team members will revise the Joint Agreement schedule accordingly. A copy of any such revised schedule will be listed in the docket and made part of the record of the application proceeding.

Subpart D—Criteria for Approval or Denial of Application and for Establishment of License Terms and Conditions; Renewal, Transfer, Modification, Revision, Suspension, Revocation, Termination, Relinquishment, and Surrender

§ 981.460 Timely approval or denial of application for a license and issuance of a license.

(a) The Administrator will approve or deny any timely filed application for a license for ownership, construction, and operation of an OTEC facility for a designated application area not later than 90 days after public hearings on the applications for that application area are concluded pursuant to § 981.360 of this part.

(b) The Administrator will approve or deny an application for a license for ownership, construction, and operation of an OTEC plantship not later than 90 days after the public hearings on the application are concluded pursuant to § 981.360 of this part.

(c) If an application is approved, the Administrator will issue a license to the applicant not later than 30 days after approval of the application, provided the application fee has been paid in accordance with § 981.130 of this part.

§ 981.470 Criteria for approval or denial.

(a) The Administrator may issue a license in accordance with the provisions of this part unless:

(1) The Administrator determines that the applicant cannot or will not comply with applicable laws, regulations, and license terms and conditions;

(2) The Administrator determines that the construction and operation of the OTEC facility or plantship will not be in the national interest and consistent with national security and other national policy goals and objectives, including energy self-sufficiency and environmental quality;

(3) The Administrator determines, after consultation with the Secretary of the department in which the Coast Guard is operating, that the OTEC facility or plantship will not be operated with reasonable regard to the freedom of navigation or other reasonable uses of the high seas and authorized uses of the Continental Shelf, as defined by United States law, treaty, convention, or customary international law;

(4) The Administrator has been informed, within 45 days after the conclusion of public hearings on that application, or on multiple applications for OTEC facilities for the designated application area, by the Administrator of the Environmental Protection Agency that the OTEC facility or plantship will not conform with all applicable provisions of any law for which EPA has regulatory authority;

(5) The Administrator has received the opinion of the Attorney General, pursuant to § 981.320 of this part, stating that issuance of the license would create a situation in violation of the antitrust laws, or the 90-day period provided in § 981.320 of this part has not expired;

(6) The Administrator has consulted with the Secretary of Energy, the Secretary of Transportation, the Secretary of State, the Secretary of the Interior, and the Secretary of Defense, to determine their views on the adequacy of the application, and its effect on programs within their respective jurisdictions and determines on the basis thereof that the application for a license is inadequate;

(7) The proposed OTEC facility or plantship will be documented under the laws of a foreign nation;

(8) The applicant has not agreed to the condition that no vessel may be used for the transportation to the United States of things produced, processed, refined, or manufactured at the OTEC facility or plantship unless such vessel is documented under the laws of the United States;

(9) When the license is for an OTEC facility, the Administrator determines that the facility, including any submarine electric transmission cables and equipment or pipelines which are components of the facility, will not be located and designed so as to minimize interference with other uses of the high seas or the Continental Shelf, including cables or pipelines already in position on or in the seabed and the possibility of their repair;

(10) The Governor of any adjacent coastal State with an approved coastal zone management program in good standing pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1451 *et seq.*) notifies the Administrator under § 981.330(d) of this part that the application is inadequate or inconsistent with respect to programs within his jurisdiction and the license cannot be conditioned as described in § 981.330(d)(4) of this part;

(11) When the license is for an OTEC facility, the Administrator determines that the operations of the fa-

cility are expected to impact so as to significantly degrade the operations of any other OTEC facility already licensed or operating, without the consent of its owner;

(12) When the license is for an OTEC facility, the Administrator determines that the operations of the facility are expected to impact so as to adversely affect the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation, unless the Secretary of State approves such impact after consultation with such nation;

(13) When the license is for an OTEC plantship, the Administrator determines that the applicant has not provided adequate assurance that the plantship will be operated in such a way as to prevent its operations from impacting so as to significantly degrade the operation of any other OTEC facility or plantship without the consent of its owner, and from impacting so as to adversely affect the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation unless the Secretary of State approves such impact after consultation with such nation;

(14) If a regulation has been adopted which places an upper limit on the number or total capacity of OTEC facilities or plantships to be licensed under this part for simultaneous operation, either overall or within specific geographic areas, the Administrator determines that issuance of the license will cause such upper limit to be exceeded;

(15) The Administrator determines that the person to whom the license would be issued is not a United States citizen; or

(16) The Administrator cannot insure that activities authorized by the license are not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat of such species, unless an appropriate exemption has been granted under section 7(h) of the Endangered Species Act (16 U.S.C. 1536(h)).

[46 FR 39394, July 31, 1981, as amended at 51 FR 20960, June 10, 1986]

§ 981.480 Multiple applications.

(a) In the event more than one application for a license for ownership, construction, and operation of an OTEC facility is submitted for the same designed application area, the Administrator will make decisions on license applications in the order in which they were submitted, unless the Administrator determines that one or a specific combination of the proposed facilities clearly best serves the national interest.

(b) In determining whether any one or a specific combination of the proposed OTEC facilities clearly best serves the national interest, the Administrator, in consultation with the Secretary of Energy, will consider the following factors:

(1) The goal of making the greatest possible use of ocean thermal energy conversion by installing the largest capacity practicable in each application area;

(2) The amount of net energy impact of each of the proposed OTEC facilities;

(3) The degree to which the proposed OTEC facilities will affect the environment;

(4) Any significant differences between anticipated dates of commencement of operation of the proposed OTEC facilities; and

(5) Any differences in costs of construction and operation of the proposed OTEC facilities, to the extent that such differentials may significantly affect the ultimate cost of energy or products to the consumer.

§ 981.490 Condition precedent to issuance of license: Compliance with conditions and prior approval of changes.

(a) *General.* No license will be issued under this part unless the prospective licensee first agrees in writing that:

(1) There will be no substantial change from the plans, operational systems, and methods, procedures, and safeguards set forth in his application, as approved, without prior approval in writing from the Administrator;

(2) There will be no change in the:

(i) Ownership of the licensee; or

(ii) Citizenship of the president or other executive officer or the chairman of the board of directors, or holder of similar office, of any member of the board of directors, of the licensee; without prior reporting, in writing, to the Administrator; and

(3) The prospective licensee will comply with license terms and conditions the Administrator may prescribe in accordance with the provisions of this part.

(b) *Emergencies.* In case of an emergency posing an imminent and substantial threat of harm to the OTEC facility or plantship, to human life, or to the environment, the licensee is not required to obtain written approval from the Administrator before making a substantial change referred to in paragraph (a)(1) of this section. If circumstances allow, the licensee should seek oral approval from the Administrator before making a substantial change. The licensee must immediately notify the Administrator, orally or in writing, of each substantial change made.

§ 981.500 Contents of license.

(a) Each license issued will contain, among other information, the following:

(1) The name and number or other identification of the OTEC facility or plantship;

(2) The name of the person to whom the license is issued;

(3) If different from the person to whom the license is issued, the name(s) of the owner and operator of the OTEC facility or plantship; and

(4) Terms and conditions on the ownership, construction, location, and operation of the OTEC facility or plantship to which the license is subject pursuant to § 981.520 of this part.

§ 981.510 Duration of licenses and renewals.

(a) *Original license.* Each license issued under this part will be for such period of years as the Administrator may specify, but not exceeding 25 years.

(b) *Renewals.* Each renewal issued under this part will be for such period of years as the Administrator may specify, but not exceeding 10 years.

§ 981.520 Terms and conditions of a license.

(a) *General.* Each license issued for an OTEC facility or plantship will contain such terms and conditions on the ownership, construction, location, and operation of the facility or plantship as specified in this section and such other terms and conditions as the Administrator may prescribe as necessary to carry out the provisions of the Act and this part, or which are required by any Federal department or agency pursuant to the terms of the Act and this part.

(b) *Disposal or removal of components of OTEC facility or plantship.* The Administrator will establish as license conditions such bonding requirements or other assurances as he deems necessary to assure that, upon the revocation, termination, relinquishment, or surrender of a license, the licensee will dispose of or remove all components of the OTEC facility or plantship as directed by the Administrator. The requirement to remove or dispose of all components may be waived by the Administrator if:

(1) In the case of components another applicant or licensee requests to use, the Administrator has not yet reached a decision on the request for continued use of the components; or

(2) In the case of components lying on or in the seabed, the Administrator finds that such removal is not otherwise necessary and that the remaining components do not constitute any threat to the environment, navigation, fishing, or other uses of the seabed.

(c) *Consistency with programs of an adjacent coastal State.* If the Governor of any adjacent coastal State which has an approved coastal zone management program in good standing pursuant to the Coastal Zone Management Act of 1972, as amended (16 U.S.C. 1451 *et seq.*), gives timely notice to the Administrator under § 981.330(d) of this part that an application is inadequate or inconsistent with the State's coastal zone management program or other applicable State or local laws, the Administrator will condition any license granted to make activities conducted under the license consistent with the State's coastal zone management program and other applicable State and local laws.

(d) *Prevention of interference with other uses of the high seas.* Each license will include such conditions as the Administrator may determine to be necessary and appropriate to ensure that construction and operation of the OTEC facility or plantship are conducted with reasonable regard for navigation, fishing, energy production, scientific research, or other uses of the high seas, either by citizens of the United States or by other nations in their exercise of the freedoms of the high seas as recognized under the Convention on the High Seas and the general principles of international law.

(e) *Discharge impacts.* (1) Each license will include such conditions as the Administrator deems necessary to ensure that discharges from the OTEC facility or plantship will not:

(i) Significantly degrade the operation of another OTEC facility or plantship, or

(ii) Create a significant adverse effect on the territorial sea or area of national resource jurisdiction, as recognized by the United States, of any other nation.

(f) *Additional license condition for OTEC plantships.* Each license issued for an OTEC plantship will contain a condition requiring that the licensee comply with such regulations concerning movement and navigation of OTEC plantships as the Coast Guard may issue under section 109(c) of the Act.

(g) *Monitoring of licensee's activities.* Each license will contain terms or conditions requiring the licensee:

(1) To allow the Administrator to place appropriate Federal officers or employees in or aboard the OTEC facility or plantship to which the license applies at such times and to such extent as the Administrator deems reasonable and necessary to assess compliance with any terms, conditions, or regulations applicable to the license, and to report to the Administrator whenever such officers or employees have reason to believe there is a failure to comply;

(2) To cooperate with such officers and employees in the performance of monitoring functions; and

(3) To monitor the environmental effects of the operation of the OTEC facility or plantship in accordance with those terms and conditions.

(h) *Diligence.* Each license will contain a condition that the licensee diligently pursue the construction and operation of the OTEC facility or plantship to which the license applies, as determined by the Administrator's estimate of a reasonable schedule for construction and operation, based on information submitted with the application. The diligence condition established by the Administrator will allow for reasonable delay resulting from unforeseen circumstances. If the Administrator determines that a licensee is not pursuing diligently the construction and operation of the OTEC facility or plantship to which the license applies, or that the project has apparently been abandoned, the Administrator will cause proceedings to be instituted under section 111 of the Act to terminate the license.

(i) *Reports and records.* Each license will contain a condition that the licensee keep such records and report periodically to the Administrator such information as the Administrator finds to be necessary and appropriate:

(1) To assess compliance with diligence conditions established under paragraph (h) of this section;

(2) To assess environmental impacts of the OTEC operations of the licensee and to develop mitigation methods; and

(3) To comply with the requirements of Federal law and regulation.

(j) *U.S.-flag transportation vessels.* Each license will contain a condition that no vessel may be used for the transportation to the United States of things produced, processed, refined, or manufactured at the OTEC facility or plantship unless such transportation vessel is documented under the laws of the United States.

(k) *Foreign-flag vessels.* Each license will contain a condition that, except in a situation involving force majeure, the licensee will not permit a vessel, registered in or flying the flag of a foreign state, to call at, load or unload cargo at, or otherwise utilize the facility or plantship which is the subject of the license unless:

(1) The foreign state involved has agreed, by specific agreement with the United States, to recognize the jurisdiction of the United States over the vessel and its personnel while the vessel is located within any safety zone around the facility or plantship established by the Secretary of the department in which the Coast Guard is operating, pursuant to section 108(d) of the Act; and

(2) The vessel owner or operator has designated an agent in the United States for receipt of service of process in the event of any claim or legal proceeding resulting from activities of the vessel or its personnel while located within such safety zone.

(l) *Compliance with other Federal law.* Each license may contain conditions imposed by the Administrator as necessary to assure the compliance of activities conducted under the license with other Federal laws and regulations. Such conditions will be based upon the review of and comment upon the application as conducted by Federal agencies and departments under Subpart C of this part.

[46 FR 39394, July 31, 1986, as amended at 51 FR 20960, June 10, 1986]

§ 981.525 Review, modification and revision of license terms and conditions.

(a) *NOAA review.* Periodically, at intervals not to exceed 3 years, the Administrator will conduct a review of each licensed OTEC facility or plantship operation in conjunction with the licensee to determine the need, if any, for modification of license terms and conditions.

(b) *Modification.* As the result of a review conducted under paragraph (a) of this section or at any other time, the Administrator, after consultation with interested Federal and State departments and agencies and the licensee, and after an opportunity for public comment, may modify any term or condition in a license consistent with the purposes of the Act and this part.

(c) *Revision.* (1) At any time during the term of a license, the licensee may submit to the Administrator a request for a revision of a license.

(2) The Administrator will approve such requests for a revision upon a finding in writing that the license with such revision would continue to meet the requirements of the Act and this part.

(3) A change which would require a request to and approval by the Administrator as a revision is any change:

(i) Which would have significance for the findings contained in § 981.470(a) which would permit the Administrator to refuse to issue a license; or

(ii) Which would result in ownership, construction, location or operation of an OTEC facility or plantship contrary to existing terms and conditions in the license.

(d) *Public notice and opportunity to comment.* The Administrator will publish in the Federal Register notice of each proposed modification, and of each request for revision, of a license term or condition. Interested persons will be allowed at least 30 days after publication of the notice to submit written comments to the Administrator. On a case-by-case basis, the Administrator will determine whether to provide additional public participation procedures, such as conducting an informal public hearing in a potentially affected adjacent coastal State.

(e) *Notice to the licensee and to Federal agencies and adjacent coastal States.* (1) The Administrator will issue written notice of each proposed modification, and of each proposed revision, of a license term or condition, to:

(i) The licensee;

(ii) Each Federal department or agency with jurisdiction over any aspect of the ownership, construction, location, or operation of the OTEC facility or plantship, which aspect may be affected by the proposed modification or revision; and

(iii) The Governor of each adjacent coastal State designated with respect to the OTEC facility or plantship involved.

(2) Each recipient of the notice may submit to the Administrator such written comments or recommendations regarding the proposed modification or revision as the recipient deems appropriate. Each Federal or State depart-

ment or agency also may take such actions as may be required by law. If a Federal or State department or agency recommends that the proposed modification or revision not be approved, it shall set forth in detail:

(i) The manner in which the proposed modification or revision does not comply with any law or regulation within its area of responsibility; and

(ii) The manner in which the proposed modification or revision may be amended so as to bring it into compliance with the law or regulation involved.

(3) Each recipient of the notice issued under paragraph (e)(1) of this section will be allowed 30 days from the date of issuance of that notice, or until the last day of the public comment period allowed under paragraph (d) of this section, whichever time period extends longer, in which to submit written comments and recommendations to the Administrator.

(f) *Initial decision.* (1) After the close of the opportunity for comment provided in paragraphs (d) and (e) of this section, the Administrator will initially approve or disapprove the proposed modification or revision.

(2) The Administrator will publish notice of the initial decision in the FEDERAL REGISTER and provide written notice of the initial decision to the licensee and to each Federal department and agency, and to the Governor of each adjacent coastal State, to which notice was issued under paragraph (e) of this section.

(g) *Acceptance or objection by licensee.* (1) The licensee will be deemed conclusively to have accepted the initial decision of the Administrator, if the licensee does not notify the Administrator, within 30 days after issuance of the written notice to the licensee under paragraph (f)(2) of this section, that the licensee objects to the initial decision. Any objection filed by a licensee must state, in writing:

(i) Why the initial decision is legally inconsistent with the Act or this part; and

(ii) Information concerning any underlying factual issue deemed by the licensee to be necessary to the Administrator's decision upon the objection.

(2) The Administrator will promptly take action on any licensee's objection which meets the requirements of paragraph (g)(1) of this section. If the Administrator determines that there exist one or more specific and material issues of fact pertaining to the initial decision on the proposed modification or revision, which must be resolved by a formal evidentiary hearing, the Administrator will provide for a formal hearing which will proceed in accordance with Subpart E of this part, except that for the purposes of a formal hearing under this section, references in Subpart E to:

(i) The "applicant" will be deemed to mean the "licensee";

(ii) The "application" will be deemed to mean "the modification or revision of the license"; and

(iii) "Issuance, transfer or renewal of a license" will be deemed to mean "modification or revision of a license."

(h) *Final action by the Administrator.* (1) After the close of the 30-day period described in paragraph (g)(1) of this section, or after taking action on a licensee's objection under paragraph (g)(2) of this section, the Administrator will take final action on the license modification or revision.

(2) The Administrator will implement a license modification or revision by issuing an appropriate document amending the license.

§ 981.530 Renewal of a license.

Each licensee shall have a preferential right to renew a license subject to the requirements of this part, upon such terms and conditions and for such period of years, not to exceed an additional 10 years for each renewal, as the Administrator determines to be reasonable and appropriate.

§ 981.540 Transfer of license.

Upon application, a license issued under this part may be transferred if the Administrator determines that such transfer is in the public interest and that the prospective transferee meets the requirements, and the prerequisites to issuance, of this part. When a licensee intends to apply for transfer of the license, the licensee and the prospective transferee shall consult with the Administrator regarding applicability of the requirements of this part to the proposed transfer.

§ 981.550 Suspension, revocation, termination, relinquishment or surrender of a license.

(a) *Suspension or revocation.* Whenever a licensee fails to comply with any applicable provision of the Act or any applicable rule, restriction, or license term or condition issued or imposed by the Administrator under this part, the Administrator may request that the Attorney General file an action in an appropriate United States district court:

(1) To suspend the license; or

(2) To revoke such license, if such failure is knowing and continues for a period of 30 days after the Administrator sends notification of such failure by registered letter to the licensee at his record post office address.

(b) *Automatic operation of license terms.* The Administrator may provide in the terms of a license for automatic suspension or termination of the license upon the occurrence of a fixed or agreed-upon condition, event, or time. In such cases, judicial proceedings under paragraph (a) of this section are not required to effect a suspension or termination.

(c) *Emergency orders.* The Administrator may order the licensee to cease or alter construction or operation activities pending the completion of a judicial proceeding pursuant to paragraph (a) of this section if the Administrator determines that immediate suspension of such activities is necessary to protect public health and safety or to eliminate any imminent and substanial danger to the environment.

(d) *Relinquishment or surrender.* (1) Any licensee may at any time, without penalty, surrender to the Administrator a license issued to him, or relinquish to the Administrator, in whole or in part, any right to conduct construction or operation of an OTEC facility or plantship, including part or all of any right of way which may have been granted in conjunction with such license. However, such surrender or relinquishment shall not relieve the licensee of any obligation or liability established by applicable law, or of any obligation or liability for actions taken by him prior to such surrender or reliquishment, or during disposal or removal of any components required to be disposed of or removed pursuant to this part.

(2) If part of all of a right of way which is relinquished, or for which the license is surrendered, to the Administrator under paragraph (d)(1) of this section contains an electric transmission cable or pipeline which is used in conjunction with another license for an OTEC facility, the Administrator shall allow the other licensee an opportunity to add such right of way to his license before informing the Secretary of the Interior that the right of way has been vacated.

[46 FR 39394, July 31, 1986, as amended at 51 FR 20960, June 10, 1986]

Subpart E—Formal Hearing Procedures

§ 981.560 Formal hearing procedures.

(a)(1) *General.* All formal hearings described in §§ 981.350 and 981.525 of this part are governed by 5 U.S.C. 554 through 557 and the procedures contained in this section.

(2) Hearings held under this section will be consolidated insofar as practicable with hearings held by other agencies.

(b) *Decision to hold a hearing.* (1) Whenever, after holding an informal hearing under § 981.340 of this part, the Administrator determines that there are one or more specific and material issues of fact pertaining to the application which must be resolved by a formal hearing, he will provide for a formal hearing.

(2) Whenever, under § 981.525 of this part, the Administrator determines that there are one or more specific and material issues of fact pertaining to the proposed modification or revision to the terms or conditions of the license which must be resolved by a formal hearing, he will provide for a formal hearing.

(3) The record developed in any formal hearing under this paragraph will be part of the basis for the Administrator's decision to approve or deny

issuance, modification, or revision of a license, as applicable.

(c) *Assignment of Administrative Law Judge.* Upon deciding to hold a formal hearing, the Administrator will refer the proceeding to the NOAA Office of Administrative Law Judges for assignment to an Administrative Law Judge (judge) to serve as presiding officer for the hearing.

(d) *Notice.* (1) The Administrator will publish public notice of the formal hearing in the FEDERAL REGISTER at least 15 days before the beginning of the hearing, and will send written notice by registered or certified mail or by personal delivery to:

(i) Each applicant;

(ii) The Governor of each adjacent coastal State;

(iii) Each person who submitted written comments upon the application, or testified at any prior informal hearing on the application; and

(iv) Each person who requests a copy of the notice.

(2) Notice of a formal hearing will include, among other things:

(i) Time and place of the hearing;

(ii) The issues in dispute which are to be resolved in the formal hearing;

(iii) The due date for filing a written request to participate in the hearing in accordance with paragraphs (f)(2) and (f)(3) of this section; and

(iv) Reference to any prior informal hearing from which the issues to be determined arose.

(e) *Powers and duties of the administrative law judge.* Judges have all the powers and duties necessary to preside over the parties and proceedings and to conduct fair and impartial hearings, as specified by 5 U.S.C. 554 through 557 and this section, including the power to:

(1) Regulate the course of the hearing and the conduct of the parties, interested persons and others submitting evidence, including but not limited to the power to require the submission of part or all of the evidence in written form if the judge determines a party will not be prejudiced thereby and if otherwise in accordance with law;

(2) Rule upon requests submitted in accordance with paragraph (f)(2) of this section to participate as a party, or requests submitted in accordance with paragraph (f)(3) of this section to participate as an interested person in a proceeding, by allowing, denying, or limiting such participation;

(3) Hold conferences in accordance with paragraph (i) of this section for the simplification or, if appropriate, settlement of the issues by consent of the parties or to otherwise expedite the proceedings;

(4) Administer oaths and affirmations;

(5) Rule upon requests for, and issue subpoenas for the attendance and testimony of witnesses and the production of books, records, and other evidence upon proper application under paragraph (p) of this section;

(6) Rule on discovery requests, establish discovery schedules, and take or cause to be taken depositions or interrogatories;

(7) Rule on requests for protective orders to protect persons in the discovery process from undue burden or expense, or for other good cause;

(8) Require, at or prior to any hearing, the submission and exchange of evidence;

(9) Rule upon offers of proof and evidence and receive, exclude, and limit evidence as set forth in paragraph (j)(3) of this section;

(10) Introduce documentary or other evidence into the record;

(11) Examine and cross-examine witnesses;

(12) Consider and rule upon motions, procedural requests, and similar matters;

(13) Take such measures as may be necessary (such as sealing portions of the hearing record) to protect information consisting of trade secrets or commercial or financial information which is privileged or confidential;

(14) Schedule the time and place of the hearing (in accordance with the Act), or the hearing conference, continue the hearing from day to day, adjourn the hearing to a later date, or a different place, and reopen the hearing at any time before issuance of the recommended or initial decision, having due regard for the convenience and necessity of the parties;

(15) Establish rules, consistent with applicable law, for media coverage of

the proceedings and for the closure of the hearing in the interest of justice;

(16) Strike testimony of a witness refusing to answer a question ruled to be proper;

(17) Make and file decisions in conformity with this subpart; and

(18) Take any action authorized by the rules in this section or in conformance with 5 U.S.C. 554 through 557.

(f) *Hearings: Participation.* (1) Parties to the formal hearing will include:

(i) The NOAA General Counsel;

(ii) The applicant; and

(iii) Any other person determined by the judge, in accordance with paragraph (f)(2) of this section, to be eligible to participate as a full party.

(2)(i) Any person desiring to participate as a party in a formal hearing must submit a request to the judge to be admitted as a party. Such person will be allowed to participate as a party if the judge finds that the interests of justice and a fair determination of the issues would be served by granting the request. The judge will give special consideration to each request from a designated adjacent coastal State to participate as a party.

(ii) Any request to participate as a party must be submitted to the judge within 10 days after the date of mailing or publication of notice of a decision to hold a formal hearing under paragraph (d) of this section, whichever occurs later. The judge may entertain a request submitted after the expiration of the 10 days, but such a late request may be granted only upon an express finding on the record that:

(A) Special circumstances justify granting the request;

(B) The interests of justice and a fair determination of the issues would be served by granting the request;

(C) The requestor has consented to be bound by all prior written agreements and stipulations agreed to by the existing parties, and all prior orders entered in the proceedings; and

(D) Granting the request will not cause undue delay or prejudice the rights of the existing parties.

(3)(i) Any interested person who desires to submit evidence in a formal hearing must submit a request to the judge within 10 days after the date of mailing or publication of notice of a decision to hold a formal hearing, whichever occurs later. The judge may waive the 10 day rule for good cause, such as if the interested person, making this request after the expiration of the 10 days, shows that he lacked actual knowledge of the formal hearing during the 10 days, and the evidence he proposes to submit may significantly affect the outcome of the proceedings.

(ii) The judge may permit any interested person to submit evidence at any formal hearing if the judge determines that such evidence is relevant to facts in dispute concerning an issue being adjudicated. The fact that an interested person may submit evidence under this paragraph at a hearing does not entitle the interested person to participate in other ways in the hearing unless allowed by the judge under paragraph (f)(3)(iii) of this section.

(iii) The judge may allow any interested person to submit oral testimony, oral arugments, briefs, or to cross-examine witnesses or participate in other ways if the judge determines that the interests of justice and a fair determination of the issues would be better served by allowing such participation by the interested person.

(g) *Certification of issues.* Whenever a formal hearing is conducted pursuant to this section, the Administrator will certify the issues for decision to the judge and the formal hearing will be limited to those issues.

(h) *Obligation to submit evidence and raise issues before a formal hearing is held.* No party or interested person may submit evidence which was not submitted previously for the administrative record as part of the comment on the application for issuance, transfer or renewal of a license, unless the judge finds that good cause exists for the failure to submit it. Good cause includes the case where the person seeking to raise the new issues or introduce new information shows that the person could not reasonably have ascertained the issues or made the information available at a prior stage in the administrative process; or that the person could not have reasonably anticipated the relevance or materiality of the information sought to be introduced.

(i) *Conferences.* (1) At any time the judge considers appropriate, he may, upon his own motion or the motion of any party or interested person, direct the parties and interested persons, or their attorneys to meet (in person, by telephone conference call, or otherwise) in a conference to consider:

(i) Simplification of the issues;

(ii) Settlements in appropriate cases;

(iii) Stipulations and admissions of fact, and contents and authenticity of documents;

(iv) Exchange of evidence, witness lists, and summaries of expected testimony;

(v) Limitation of the number of witnesses; and

(vi) Such other matters as may tend to expedite the disposition of the proceedings.

(2) The record will show how the matters were disposed of by order and by agreement in such conferences.

(j) *Hearings: Appearance and presentation of evidence*—(1) *Representative.* A party or interested person may appear at a hearing under this part in person, by attorney, or by other representative.

(2) *Failure to appear.* (i) Absent a showing of good cause, failure of a party to appear at a hearing:

(A) Constitutes waiver of the right to a hearing under this section;

(B) Constitutes consent of the party to the making of a decision on the record of the hearing; but

(C) Will not be deemed to be a waiver of the right to be served with a copy of the judge's decision.

(ii) If a party fails to appear for a hearing, the judge will cause to be placed in the record all of the facts concerning the issuance and service of the notice of the time and place of the hearing.

(3) *Evidence.* (i) The order of presentation of evidence will be at the judge's discretion.

(ii) The testimony of witnesses will be upon oath or affirmation administered by the judge and will be subject to such cross-examination as may be required for a full and true disclosure of the facts. The formal rules of evidence do not apply, but the judge will exclude evidence which is immaterial, irrelevant, non-probative, or unduly repetitious. Hearsay evidence is not inadmissable as such.

(iii) If a party objects to the admission or rejection of any evidence or to the limitation of the scope of any examination or cross-examination or the failure to limit such scope, the party must state briefly the grounds for such objections. Rulings on each objection will appear in the record.

(iv) Formal exception to an adverse ruling is not required.

(v) At any time during the proceedings, the judge may require a party or a witness to state his position on any issue, and the theory in support of such position.

(vi) Upon the failure of a party or interested person to effect the appearance of a witness or the production of a document or other evidence ruled relevant and necessary to the proceeding, the judge may take appropriate action, as authorized by law.

(vii) The parties may, by stipulation, agree upon any facts involved in the proceedings and include them in the record with the consent of the judge. Written stipulations shall be signed in accordance with paragraph (r)(2) of this section, and shall be served upon all parties of record within the time period specified by the judge.

(4) *Authority of judge to expedite adjudication.* To prevent unnecessary delays or an unnecessarily large record, the judge may:

(i) Limit the number of witnesses whose testimony may be cumulative;

(ii) Strike argumentative, repetitious, cumulative, immaterial, non-probative, or irrelevant evidence;

(iii) Take necessary and proper measurses to prevent argumentative, repetitious, or cumulative cross-examination; and

(iv) Impose such time limitations on arguments as the judge determines appropriate, having regard for the volume of the evidence and the importance and complexity of the issues involved.

(5) *Argument.* At the close of any formal hearing any party shall be given the opportunity to submit written arguments on issues before the judge.

(6) *Official notice.* Official notice may be taken of any matter not ap-

pearing in evidence in the record, which is among the traditional matters of judicial notice, or concerning which the Department of Commerce, by reason of its functions, is deemed to be expert, or of a non-privileged document required by law to be filed with, prepared or published by a government body, or of any reasonably available public document. The parties will be given adequate notice, at the hearing or otherwise before the judge's decision, of the matters so noticed, and upon timely request by a party will be given reasonable opportunity to show the contrary.

(7) *Record.* (i) The judge or the Administrator will arrange for a verbatim tape or other record of any oral hearing proceedings. An official transcript of the proceedings will be prepared and copies may be obtained upon written request filed with the reporter and upon payment of the fees at the rate provided in the agreement with the reporter.

(ii) The official transcript, exhibits, briefs, reply briefs, proposed findings of fact, requests and other documents and papers filed will constitute the exclusive record for decision on the issues concerning which the hearing was held.

(iii) The record developed in any hearing held pursuant to § 981.350 of this part will be part of the basis for the Administrator's decision to approve or deny the license.

(k) *Interlocutory appeals.* (1) At the request of a party or on the judge's own motion, the judge may certify to the Administrator for review a ruling which does not finally dispose of the proceeding if the judge determines that such a ruling involves a controlling question of law and that an immediate appeal therefrom may materially advance the ultimate disposition of the matter.

(2) Upon certification by the judge of an interlocutory ruling for review, the Administrator will expeditiously decide the matter, taking into account any briefs in this respect filed by the parties within 10 days after certification. The Administrator's order on an interlocutory appeal will not be considered the final decision of the Administrator except by operation of other provisions in this section.

(3) No interlocutory appeal will lie as to any ruling not certified to the Administrator by the judge. Objections to rulings not certified to the Administrator by the judge will be a part of the record and will be subject to review at the same time and in the same manner as the Administrator's review of the recommended or initial decision of the judge.

(l) *Decision*—(1) *Proposed findings of fact.* The judge will allow each party to file with the judge proposed findings of fact together with a supporting brief expressing the reasons for such proposals. Such proposals and briefs must be filed on or before the date specified by the judge. Such proposals and briefs must refer to all portions of the record and to all authorities relied upon in support of each proposal. Reply briefs must be submitted within 10 days after receipt of the proposed findings to which they respond, unless the judge allows additional time.

(2) *Recommended decision.* As soon as practicable, but normally not later than 30 days after the close of the record in the proceedings, the judge will evaluate the record of the formal hearing and prepare and file a recommended decision with the Administrator. The formal hearing must be concluded within 240 days after the publication of the notice of application pursuant to § 981.290(a) of this part.

(3) *Final decision.* (i) As soon as practicable, but normally not later than 30 days after receipt of the recommended decision, the Administrator will issue a final decision. The final decision may accept or reject all or part of the recommended decision.

(ii) The Administrator will base the final decision upon the record already made, except that the Administrator may issue orders:

(A) Specifying the filing of supplemental briefs; or

(B) Remanding the matter to a judge for the receipt of further evidence, or for other assistance in the determination of the matter.

(iii) With respect to hearings to resolve material issues of fact pursuant to § 981.350 of this part, the Administrator may defer announcement of his final decision on the findings of fact until the time he takes final action on the issuance, transfer or renewal of a license.

(m) *Motions and requests.* Motions and requests must be filed in writing with the judge or must be stated orally and made part of the hearing record. Each motion or request must state the particular order, ruling, or action desired, and the legal and factual grounds therefor.

(n) *Witnesses and fees.* Witnesses subpoenaed will be paid the same fees and mileage, and in the same manner, as are paid for like services in the District Court of the United States for the district in which the hearing is located.

(o) *Depositions.* (1) Any party desiring to take the deposition of a witness shall make application in writing to the judge, setting forth the reasons why such deposition should be taken; the time when, the place where, and the name and mailing address of the person before whom the deposition is requested to be taken; the name and address of each witness to appear for deposition; and the subject matter concerning which each witness is expected to testify.

(2) Depositions may be taken orally or upon written interrogatories before any person designated by the judge.

(3) Such notice as the judge shall order will be given for the taking of a deposition, but this ordinarily will not be less than 5 days' written notice when the deposition is to be taken within the United States and ordinarily will not be less than 20 days' written notice when the deposition is to be taken elsewhere.

(4) Each witness testifying upon deposition will be sworn and any party will have the right to cross-examine. The questions propounded and the answers thereto, together with all objections made, will be reduced to writing, read to the witness, signed by the witness unless waived, and certified by the person presiding. Thereafter, the person presiding will deliver or mail a copy of the document to each party. Subject to such objection to the questions and answers as were noted at the time of taking the deposition which would be valid were the witness personally present and testifying, such deposition may be read and offered in evidence by any party taking it as against any party who was present or represented at the taking of the deposition or who had due notice thereof.

(p) *Subpoenas.* A party may request the judge to issue or the judge on the judge's own motion may issue a subpoena for the attendance and testimony of witnesses and for the production of documentary or other evidence. Applications for subpoenas must be in writing, and must specify the general relevance and reasonable scope of the evidence sought to be produced.

(q) *Extension of time.* The time for the filing of any document under this section may be extended by the judge if:

(1) The request for the extension of time is made before or on the final date allowed for the filing; and

(2) The judge, after giving written or oral notice to and considering the views of all other parties (when practicable), determines that there is good reason for the extension.

(r) *Filing, submission and service of documents.* (1) Whenever the regulations in this subpart or an order issued hereunder require a document to be filed within a certain period of time, such document will be considered filed as of the date of the postmark, if mailed, or (if not mailed) as of the date actually delivered to the office where filing is required. Time periods will begin to run on the day following the date of the document or event which begins the time period.

(2) All submissions must be signed by the person making the submission, or by the person's attorney or other authorized agent or representative.

(3) Service of a document must be made by delivering or mailing a copy of the document to the known address of the person being served.

(4) Whenever the regulations in this subpart require service of a document, such service may effectively be made on the agent for the service of process or on the attorney for the person to be served.

(5) Refusal of service of a document by the person to be served, his agent, or attorney, will be deemed effective

service of the document as of the date of such refusal.

(6) A certificate of the person serving the document by personal delivery or by mailing, setting forth the manner of the service, will be proof of the service.

§ 981.570 Ex parte communications.

(a) "*Ex parte* communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but does not include requests for status reports.

(b) Except to the extent required for disposition of *ex parte* matters as authorized by law, upon assignment of a matter to an administrative law judge and until the final decision of the Administrator is effective under these regulations, no *ex parte* communication relevant to the merits of the proceeding shall be made, or knowingly caused to be made:

(1) By the judge or by an agency employee involved in the decisional process of the proceeding to any interested person outside NOAA; or

(2) By an interested person outside NOAA to the judge or to any agency employee involved in the decisional process of the proceeding.

(c) The judge may not consult any person or party on a fact in issue unless on notice and opportunity for all parties to participate.

(d) An agency employee or judge who makes or receives a prohibited communication must place in the hearing record the communication and any response thereto, and the judge, or Administrator, as appropriate, may take action in this respect consistent with these regulations, the Act, and 5 U.S.C. 556(d) and 557(d).

(e) This section does not apply to communications to or from the attorney representing the Administrator in the proceedings (agency representative). However, the agency representative may not participate or advise in the initial or recommended decision of the judge or the Administrator's review thereof except as witness or counsel in the proceeding in accordance with these regulations.

(f)(1) Paragraphs (b) through (d) of this section do not apply to communications concerning national defense or foreign policy matters. Such Ex Parte communications:

(i) On national defense or foreign policy matters to or from an agency employee; or

(ii) From employees of the United States Government involving intergovernmental negotiations;

are permitted if the communicator's position with respect to those matters cannot otherwise be fairly presented for reasons of foreign policy or national defense.

(2) Ex Parte communications subject to paragraph (f) of this section shall be made a part of the public record to the extent that they do not include information classified pursuant to Executive Order. Classified information shall be included in a classified portion of the record which shall be available for review only in accordance with applicable law.

Subpart F—Enforcement Procedures

§ 981.580 General.

(a) *Purpose and scope.* (1) Section 302 of the Act authorizes the Administrator to assess a civil penalty, in an amount not to exceed twenty-five thousand dollars ($25,000) for each violation, against any person found to have committed an act prohibited by section 301 of the Act. Each day of a continuing violation is a separate offense.

(2) Section 111 of the Act describes the circumstances under which the Administrator may suspend or terminate a license, or seek revocation of a license, for violation of the Act or of any regulation, restriction or condition issued under the Act.

(3) Section 302 of the Act authorizes the Administrator to issue orders directing any person subject to section 301 of the Act to comply with the Act, or any rule, regulation, order, license, term, or condition issued under the Act. Section 302 also authorizes the Administrator to bring a civil action for appropriate relief, including temporary or permanent injunctive relief, to halt or redress any such violation.

(4) Section 110 of the Act authorizes the Administrator to place observers

on ocean thermal energy conversion facilities and plantships licensed under the Act to monitor compliance and environmental effects of activities under the license.

(5) Section 114 of the Act describes the circumstances under which a person may bring a civil action against an alleged violator or against the Administrator for failure to perform a nondiscretionary duty, and directs the Administrator to issue regulations governing procedures prerequisite to such a civil action.

(6) The regulations in this subpart provide uniform rules and procedures for the assessment of civil penalties (§§ 981.590 and 981.600 of this part); establishment of license sanctions (§ 981.610 of this part); issuance of compliance orders (§ 981.620 of this part); placement of observers on or in OTEC facilities and plantships (§ 981.630 of this part); and the giving of advance notice of private civil actions (§ 981.640 of this part).

(b) *Filing and service of documents.* (1) Filing and service of documents required by this subpart shall be in accordance with §§ 981.560(r) and 981.158 of this part. The method for computing time periods set forth in §§ 981.560(r) and 981.158 of this part also applies to any action or event, such as payment of a civil penalty, required by this subpart to take place within a specified period of time.

(2) If an oral or written request is made to the Administrator within 10 days after the expiration of a time period established in this subpart for the required filing of documents, the Administrator may permit a late filing if the Administrator finds reasonable grounds for an inability or failure to file within the time period. All extensions will be in writing. Except as provided by this paragraph, by 15 CFR 904.102 or by order of an administrative law judge, no requests for an extension of time may be granted.

[46 FR 39394, July 13, 1981; 47 FR 31861, July 23, 1982]

§ 981.590 Assessment procedure.

Subpart B of 15 CFR Part 904 governs the procedures for assessing a civil penalty under the Act, and the rights of any person against whom a civil penalty is assessed.

[46 FR 61652, Dec. 18, 1981]

§ 981.600 Hearing and appeal procedures.

Subpart C of 15 CFR Part 904 governs the hearing and appeal procedures for civil penalties assessed under the Act.

[46 FR 61652, Dec. 18, 1981]

§ 981.610 License sanctions.

(a) *Application of section.* This section governs the suspension, revocation, termination or modification of any license issued under this part for failure to comply with any provision of the Act, or any regulation, order, license condition or restriction issued under the Act.

(b) *Basis for sanctions.* (1) The Administrator may act under this section with respect to a license issued under the Act, if:

(i) The terms of the license call for suspension or termination of the license upon the occurrence of a fixed or agreed upon condition, event or time and the Administrator determines that such condition, event, or time has occurred; or

(ii) The Administrator determines in accordance with paragraph (d)(1)(ii) of this section that immediate suspension of the license, or immediate suspension or modification of any activity under the license, is necessary; or

(iii) An appropriate court issues an order of suspension or revocation with respect to the license.

(2) The Administrator may suspend a license in accordance with paragraph (b)(1) and the other provisions of this section, on the basis that the licensee has failed to pay any penalty assessed, or fine imposed, under section 302 of the Act. The license may be reinstated by affirmative order of the Administrator upon receipt, as prescribed in paragraph (d) of this section, of full payment of the penalty assessed, together with interest thereon at the annual rate provided by current regulations of the Department of the Treasury as to late payments of amounts due the Government, computed from the date payment first

became overdue, or upon full payment, in accordance with any applicable court order, of the fine imposed.

(c) *Nature of sanctions.* In the Administrator's discretion and subject to the requirements of this section, the Administrator may take any of the following actions or combinations thereof with respect to a license issued under the Act:

(1) Revoke the license;

(2) Suspend the license or any activity under the license, either for a specified period of time or until certain stated requirements are met, or both;

(3) Modify the license, for example by imposing additional conditions and restrictions in order to aid future enforcement efforts; or

(4) Terminate the license in accordance with the provisions of this subpart.

(d) *Notice of license sanction.* (1) If the Administrator determines, on the basis of available information, that the licensee is not in compliance with any applicable provision of the Act, or any regulation, order or any license condition or restriction issued under the Act, the Administrator may issue the licensee a notice of license sanction (NOLS) stating that the Administrator has requested the Attorney General to file an action in an appropriate United States district court, seeking a sanction against the license involved. The NOLS will state the sanction proposed by the Administrator to be imposed as provided in paragraph (c) of this section, and the basis therefor and will advise that issuance of the NOLS does not preclude the Administrator from taking, at any time, any other enforcement action under section 302 or any other applicable provision of the Act.

(i) If the Administrator expects to seek revocation of the license, the NOLS will advise that:

(A) If the violation set forth in the NOLS continues for a period of 30 days from the date of issuing the NOLS, the Administrator may request the Attorney General to seek revocation of the license in an appropriate United States district court;

(B) The licensee may, within 30 days after the date of issuing the NOLS, submit to the Administrator evidence of compliance; and

(C) If the Administrator determines, on the basis of evidence submitted during the 30-day period, that the licensee has complied, the Administrator will not seek revocation of the license.

(ii) The Administrator may immediately suspend the license or suspend or modify any activity under the license pending completion of judicial proceedings under section 111(a) of the Act if the Administrator finds, and issues an emergency order summarizing the finding and the basis therefor, that such action is necessary to:

(A) Protect public health and safety; or

(B) Eliminate imminent and substantial danger to the environment.

(iii) If the Administrator acts under paragraph (d)(1)(ii) of this section, the Administrator will serve the emergency order in the manner described in paragraph (d)(4) of this section, and will seek to expedite judicial proceedings.

(iv) The licensee may request the Administrator to review any emergency order issued under paragraph (d)(1)(ii) of this section. The Administrator will determine whether any review of the emergency order should be granted, and whether any review granted will be in the form of an informal or formal hearing. The Administrator's granting of a review will not change the effective date of the emergency order unless the Administrator specifies such a change in writing when granting the review of the emergency order.

(2) If the Administrator determines, on the basis of available information, that the licensee is not in compliance with the license, and if the license provides for a license sanction on the basis of such failure to comply, the Administrator may issue a NOLS setting forth the sanction to be imposed and the basis therefor. If an opportunity for a hearing is provided by paragraph (e) of this section, the NOLS will advise that the licensee has 30 days from receipt of the notice in which to request or waive a hearing. The notice will further state the effective date of the sanction, which will

not be earlier than 30 days after the date of the notice except as provided in paragraph (d)(1)(ii) of this section or in the license. If a hearing opportunity is provided and a hearing is requested in a timely manner, the sanction becomes effective under paragraph (h) of this section.

(3) If a United States district court issues an order calling for a license sanction, the Administrator will issue a NOLS setting forth the sanction to be imposed and the effective date of the sanction. The NOLS will advise that an appeal of the district court's order will not stay the taking effect of the sanction, unless provided otherwise by the court.

(4) The NOLS will be served personally or by registered or certified mail, return receipt requested, on the licensee.

(e) *Opportunity for hearing on an NOLS issued under paragraph (d)(2) of the section.* (1) The licensee has 30 days from receipt of the NOLS to request a hearing with respect to an NOLS issued under paragraph (d)(2) of this section. However, no hearing is required with respect to matters previously adjudicated in an administrative or judical hearing in which the licensee has been given notice and has had an opportunity to participate.

(2) If the licensee wishes a hearing, a written and dated request shall be served on the Administrator either in person or by certified or registered mail, return receipt requested, at the address specified in the NOLS. The request shall either attach a copy of the relevant NOLS or refer to the relevant NOAA case number.

(3) If no hearing is required by or requested under paragraph (e)(1) of this section, the Administrator may nonetheless order a hearing if the Administrator determines that there are material issues of fact, law or equity to be further explored.

(4) The Administrator may apply to the administrative law judge for an interim order suspending the license, or suspending or modifying any activity under the license, pending completion of proceedings under this section if the Administrator serves prior notice of the application for an interim order on the licensee in the manner described in paragraph (d)(4) of this section. The judge may issue an interim order consistent with the purposes of the Act, unless preliminary evidence presented to the judge indicates a likelihood that the licensee will prevail in the matters at issue.

(5) If the license provides an effective date for the sanction, a request for hearing will not delay the effectiveness of the sanction, except to the extent extended by the Administrator for good cause shown.

(f) *Hearing and initial decision.* If a timely request for a hearing under paragraph (e)(1) of this section is received or the Administrator orders a hearing under paragraph (e)(3) of this section, the Administrator will appoint a hearing officer to hear the matter and render an initial decision.

(g) *Appeals.* (1) Any party may appeal the initial decision of the hearing officer by filing a notice of appeal with the Administrator within 30 days after the date of the initial decision. The notice of appeal shall concisely state such exceptions as the appellant takes to the initial decision and shall contain citations to the record or other authority relied upon. The appellant shall serve a copy of the notice of appeal on each other party.

(2)(i) The Administrator will decide the appeal upon the record already made, except that the Administrator may issue orders:

(A) Specifying the filing of supplemental briefs; or

(B) Remanding the matter to a hearing officer for the receipt of further evidence, or other assistance in the determination of the matter.

(ii) The decision of the Administrator will be in writing and will state the reasons for accepting or rejecting the exceptions taken by the appellant. To the extent the Administrator's decision is silent as to a material issue of fact, law, or discretion at issue in the hearing, the decision will be deemed to adopt the findings and conclusions, and the reasons and basis therefor, contained in the initial decision.

(h) *Final decision.* (1) Unless a notice of appeal is timely filed in accordance with paragraph (g) of this section, the initial decision of the hearing officer becomes effective and constitutes the final decision and order of the Administrator on the 30th calendar day after the date it is rendered.

(2) If a notice of appeal is timely filed as provided in paragraph (g) of this section, the Administrator's decision becomes effective and constitutes the final decision and order of the Administrator on the date it is issued, or as otherwise specified by the Administrator in the decision. The Administrator will serve notice of the decision on the licensee in the manner described in paragraph (d)(4) of this section.

§ 981.620 Compliance orders.

(a) The Administrator may issue a compliance order, served personally or by registered or certified mail, return receipt requested, to any person subject to section 301 of the Act who is found by the Administrator, on the basis of available information, to be in violation of the Act, or any regulation, order, license term or condition issued under the Act or this part. Although no specific form is prescribed, the compliance order will contain:

(1) A concise statement of the facts determined to show a violation;

(2) A specific reference to the provisions of the Act, regulation, order or license determined to be violated; and

(3) The time period in which the person shall comply with the order.

(b) With respect to the time period for compliance with the order, the Administrator will specify a reasonable time period, up to 30 days, taking into account the seriousness of the violation and any good faith efforts to comply with applicable requirements.

(c) The compliance order will advise the person to whom it is issued that:

(1) Failure to comply within the specified time period will subject that person to adverse enforcement action under the Act (in addition to any such action already begun); and

(2) The order may be challenged during any enforcement proceeding brought under the Act as a result of the violation specified in the order or an alleged failure to comply with the order.

(d) The person to whom a compliance order is issued may seek amendment or modification of the order to conform to the facts or law as that person sees them by notifying the Administrator at the telephone number or address specified in the order. The Administrator will either amend the order, or decline to amend it, and will so notify the person concerned.

(e) Evidence of compliance with an order issued under this section shall be presented to the Administrator in writing within the time period specified in the order. The Administrator will, as soon as practicable, determine whether or not there is timely compliance with the order, and advise the person concerned of the determination.

(f) Issuing a compliance order under this section, or complying with such an order, does not preclude other enforcement proceedings under the Act or this part if such proceedings serve the purposes of the Act, except if expressly so stated in the order, or as provided in section 111 of the Act with respect to license revocation.

§ 981.630 Observers.

(a) *Purpose of observers.* Each licensee shall allow, at such times and to such extent as the Administrator deems reasonable and necessary, an observer (as used in this section, the term "observer" means "one or more observers") duly authorized by the Administrator to board, enter or accompany any OTEC facility or plantship to which a license applies, for the purposes of observing and reporting on:

(1) The effectiveness of the terms and conditions of the license;

(2) Compliance with the Act, regulations and orders issued under the Act, and the license terms and conditions; and

(3) The environmental and other effects of the licensee's activities under the license.

(b) *Notice to licensee.* (1) The Administrator may notify a licensee that the Administrator plans to place an observer in or aboard the OTEC facility or plantship to which the license applies.

(2) The Administrator normally will issue any such notice as far in advance of placement of the observer as is practicable.

(3) *Contents of notice.* The notice given by the Administrator may include, among other things:

(i) The name of the observer, if known at the time the notice is issued;

(ii) The length of time which the observer likely will be in or aboard the OTEC facility or plantship;

(iii) Information concerning activities the observer is likely to conduct; and

(iv) Information concerning any special requirements for the handling, storage, location, or operation of, or the power supply for, equipment to be used by the observer.

(c) *Licensee's response.* Upon request by the Administrator, each licensee shall promptly notify the Administrator regarding the suggested time and method for transporting the observer to the OTEC facility or plantship.

(d) *Duties of licensee.* Each licensee of an OTEC facility or plantship to which an observer is assigned shall assure that the observer is provided:

(1) Access to and use of the OTEC facility or plantship's communications equipment and personnel when the observer deems such access necessary for the transmission and receipt of messages;

(2) Access to and use of the OTEC facility or plantship's navigation equipment and personnel when the observer deems such access necessary to determine the facility or plantship's location;

(3) All other reasonable cooperation and assistance to enable the observer to carry out the observer's duties; and

(4) Temporary accommodations and food to the observer in or aboard the OTEC facility or plantship which are equivalent to those provided to officers or senior operations personnel of the OTEC facility or plantship.

(e) *Reasonableness of observer activities.* (1) To the maximum extent practicable, observation duties will be carried out in a manner that minimizes interference with the licensee's activities under the license.

(2) The Administrator will assure that equipment brought into or aboard an OTEC facility or plantship by the observer is reasonable as to size, weight, and electric power and storage requirements, taking into consideration the necessity of the equipment for carrying out the observer's functions.

(3) The observer will have no authority over the operation of the OTEC facility or plantship or its activities, or the officers, crew, or personnel of the OTEC facility or plantship. The observer will comply with all orders of the master or senior operations official which are necessary to ensure the safe operation of the OTEC facility or plantship and the safety of its personnel.

(f) *Non-interference with observer.* Licensees and other persons are reminded that the Act (see, for example, sections 301(2) and 301(3)) makes it unlawful for any person subject to section 301 of the Act to interfere with any observer in the performance of the observer's duties.

(g) *Confidentiality of information.* NOAA recognizes the possibility that an observer, in performing observer functions, will record information which the licensee considers to be proprietary. NOAA intends to protect such information consistent with applicable law. The Administrator may in appropriate cases provide the licensee an opportunity:

(1) To review those parts of the observer's reports which may contain proprietary information; and

(2) To request confidential treatment of such information under § 981.100 of this part.

§ 981.640 Advance notice of civil actions.

(a) *Actions against alleged violators.* (1) No civil action may be filed in a United States district court under section 114 of the Act against any person for alleged violation of the Act, or any regulation, or license term or condition issued under the Act, until 60 days after the Administrator and any alleged violator receive written and dated notice of the alleged violation.

(2) The notice shall contain:

(i) A concise statement of the facts believed to show a violation;

(ii) A specific reference to the provisions of the Act, regulation or license allegedly violated; and

(iii) Any documentary or other evidence of the alleged violation.

(b) *Actions against the Administrator.* (1) No civil action may be filed in a United States district court under section 114 of the Act against the Administrator for an alleged failure to perform any act or duty under the Act which is not discretionary until 60 days after the Administrator receives a written and dated notice of intent to file the action.

(2) The notice shall contain:

(i) A specific reference to the provisions of the Act, regulations or license believed to require the Administrator to perform a nondiscretionary act or duty;

(ii) A precise description of the act or duty believed to be required by such provisions;

(iii) A concise statement of the facts believed to show a failure to perform the act or duty; and

(iv) Any documentary or other evidence of the alleged failure to perform the act or duty.

Subpart G—Upper Limits on the Number or Total Capacity of OTEC Facilities and Plantships to be Licensed Under This Part—[Reserved]

Subpart H—OTEC Site Evaluation and Preconstruction Testing Regulations—[Reserved]

Subpart I—Procedures for Mediation of Disputes Among Licensees Regarding Interference Between OTEC Facilities or Plantships—[Reserved]

CHAPTER XI—TECHNOLOGY ADMINISTRATION, DEPARTMENT OF COMMERCE

(Part 1150)

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1150 Marking of toy, look-alike and imitation firearms . 422

PART 1150—MARKING OF TOY, LOOK-ALIKE AND IMITATION FIREARMS

Sec.
1150.1 Applicability.
1150.2 Prohibitions.
1150.3 Approved markings.
1150.4 Waiver.
1150.5 Preemption.

AUTHORITY: Section 4 of the Federal Energy Management Improvement Act of 1988, 15 U.S.C. 5001.

SOURCE: 54 FR 19358, May 5, 1989, unless otherwise noted.

§ 1150.1 Applicability.

This part applies to toy, look-alike and imitation firearms ("devices") having the general appearance, shape, and/or configuration of a firearm and produced or manufactured and entered into commerce on or after May 5, 1989, including devices modelled on real firearms manufactured, designed, and produced since 1898. This part does not apply to any toy, look-alike, or imitation firearm that is a non-firing replica of an antique firearm modelled on a real firearm designed, manufactured, and produced prior to 1898, nor to traditional B-B, paint-ball, or pellet-firing air guns that expel a projectile through the force of compressed air, compressed gas or mechanical spring action, or any combination thereof, as described in American Society for Testing and Materials standard F 589-85, *Standard Consumer Safety Specification for Non-Powder Guns*, June 28, 1985. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies may be obtained from the American Society for Testing and Materials, 1916 Race Street, Philadelphia, Pa. 19103. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 1100 L Street, NW., Room 8401, Washington, DC.

§ 1150.2 Prohibitions.

No person shall manufacture, enter into commerce, ship, transport, or receive any toy, look-alike, or imitation firearm ("device") covered by this Part as set forth in § 1150.1 of this part unless such device contains, or has affixed to it, one of the markings set forth in § 1150.3 of this part, or unless this prohibition has been waived by § 1150.4 of this part.

§ 1150.3 Approved markings.

The following markings are approved by the Secretary of Commerce:

(a) A blaze orange (*Federal Standard 595a, February, 1987, color number 12199,* issued by the General Services Administration) solid plug permanently affixed to the muzzle end of the barrel as an integral part of the entire device and recessed no more than 6 millimeters from the muzzle end of the barrel. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR Part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register. 1100 L Street, NW., Room 8401, Washington DC.

(b) For any water gun, air-soft gun, light-emitting gun or other ejecting toy, look-alike or imitation firearm having an opening to discharge such things as water, non-metallic projectiles, and light, a blaze orange (*Federal Standard 595a, February, 1987, color number 12199,* issued by the General Services Administration) marking permanently affixed to the exterior surface of the barrel, covering the circumference of the barrel from the muzzle end for a depth of at least 6 millimeters. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S C. 552(a) and 1 CFR Part 51. Copies of Federal Standard 595a may be obtained from the Office of Engineering and Technical Management, Chemical Technology Division, Paints Branch, General Services Administration, Washington, DC 20406. Copies may be inspected at the office of the Associate Director for Industry and Standards, National Institute for Standards and Technology, Gaithersburg, Maryland, or at the Office of the Federal Register, 1100 L Street, NW., Room 8401, Washington, DC.

(c) Construction of the device entirely of transparent or translucent materials which permits unmistakable observation of the device's complete contents.

(d) Coloration of the entire exterior surface of the device in bright red, bright orange, bright yellow, bright green, or bright blue, either singly or as the predominant color in combination with other colors in any pattern.

(e) Coloration of the entire exterior surface of the device predominantly in white in combination with one or more of the colors bright red, bright orange, bright yellow, bright green, or bright blue in any pattern.

§ 1150.4 Waiver.

The prohibitions set forth in § 1150.2 of this part are waived for any toy, look-alike or imitation firearm that will be used only in the theatrical, movie or television industries.

§ 1150.5 Preemption.

In accordance with section 4(g) of the Federal Energy Management Improvement Act of 1988 (15 U.S.C. 5001(g)), the provisions of section 4(a) of that Act and the provisions of this part supersede any provision of State or local laws or ordinances which provides for markings or identification inconsistent with the provisions of section 4 of that Act or the provisions of this part.

CHAPTER XII—UNITED STATES TRAVEL AND TOURISM ADMINISTRATION, DEPARTMENT OF COMMERCE

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PART 1200—ISSUANCE OF GRANTS TO PROMOTE TRAVEL TO STATES OR THEIR POLITICAL SUBDIVISIONS BY FOREIGN RESIDENTS

Sec.
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AUTHORITY: Pub. L. 87-63, as amended by Pub. L. 88-420 and Pub. L. 91-477; Department of Commerce Organization Order 10-7 of November 12, 1970.

SOURCE: 36 FR 17036, Aug. 27, 1971, unless otherwise noted.

§ 1200.1 Background and purpose.

The regulations in this part are issued under the authority of the International Travel Act of 1961, as amended. The purpose of the Act is to strengthen the domestic and foreign commerce of the United States; promote friendly understanding and appreciation of the United States by encouraging foreign residents to visit the States, as defined in § 1200.2; and facilitate international travel in general. On October 21, 1970, the Act was amended by Pub. L. 91-477. One of the amendments made to the Act by Pub. L. 91-477 authorized the U.S. Travel and Tourism Administration to make matching Federal grants to States or their political subdivisions, or private or public nonprofit organizations, in an effort to encourage foreign residents to visit the United States and to upgrade and improve the tourist host and reception facilities in this country thereby furthering the stated purposes of the Act.

[36 FR 17036, Aug. 27, 1971, as amended at 55 FR 53489, December 31, 1990]

§ 1200.2 Definitions.

(a) *Act* means the International Travel Act of 1961, as amended (22 U.S.C. 2121 et seq.).

(b) *Assistant Secretary* means the Assistant Secretary of Commerce for Tourism or such official as may be designated to act in his behalf.

(c) *State* means one of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(d) *Political subdivision* means a unit of local government, including specifically, a county, municipality, city, town, township, or other special district created by or pursuant to law.

(e) *Private or public non-profit organizations* means an institution, organization, or association, either private or public, which has tax exempt status as defined in section 501(a) of the Internal Revenue Code.

(f) *Applicant* means a State or political subdivision or combination thereof, or private or public nonprofit organization seeking a Federal grant for a travel promotional project.

(g) *Travel promotional project* means an activity or program designed to enhance a State or political subdivision as a desired travel destination of residents of foreign countries or to inform such residents and to encourage them to visit a State or political subdivision through such means as:

(1) Preparing and disseminating materials, including brochures, leaflets, booklets, posters, and displays featuring domestic regional and local attractions in appropriate foreign languages in foreign cities and countries that constitute a potential travel market to the States;

(2) Carrying out either singly or in conjunction with other States and/or other political subdivisions and/or with U.S. Travel and Tourism Administration, special promotions of facilities, attractions, events and services of an area by means of exhibits, shows, films, etc.;

(3) Planning, developing and sponsoring advertising campaigns in foreign countries to inform and encourage foreign residents to visit;

(4) Undertaking projects to upgrade and improve tourist facilities and services to better serve the foreign resident;

(5) Carrying out other projects that indicate a high probability of increasing foreign tourism;

(h) *Matching funds* means funds that are provided by the State or political subdivision or by a combination thereof, or from other non-Federal sources and may include fees, contributions, donations, gifts of money, and special user charges from persons and private profit or nonprofit firms, organizations, or institutions.

[36 FR 17036, Aug. 27, 1971, as amended at 55 FR 53489, December 31, 1990]

§ 1200.3 Applications for Federal grant for travel promotional projects.

(a) Each applicant seeking a Federal grant for a travel promotional project shall file an application, as further specified below, with the Assistant Secretary.

(b) Every application, exhibit, or enclosure, except where specifically waived by the Assistant Secretary, shall be in quadruplicate, duly authenticated and referenced, and addressed to the Assistant Secretary of Commerce for Tourism, U.S. Travel and Tourism Administration, U.S. Department of Commerce, Washington, DC 20230.

(c) Every application shall be on USTS Form, "Request for Travel Promotion Project Grant," which is available from the U.S. Travel and Tourism Administration. This application form incorporates assurances of compliance with the nondiscrimination requirements of title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d-1 et seq.) and implementing regulations (§ 8.1 et seq. of this title). Also, the form shall contain the date, address, and official title of the applicant and shall be signed by an authorized representative.

(d) Every application, except where specifically waived by the Assistant Secretary, shall be accompanied by the following exhibits:

(1) *Exhibit No. 1.* A statement setting forth in detail the current level of tourism in area in terms of (i) numbers of tourists in area, both foreign and domestic; (ii) impact of tourism on area economy (i.e., employment and income); and (iii) current efforts to develop and promote tourism in area.

(2) *Exhibit No. 2.* A project statement setting forth in detail the existing need for Federal assistance, the goals and objective thereof, in terms of tourism receipts and their effects on area jobs and income, the specific methods proposed for accomplishing these objectives in terms of personnel and funds and the procedures that will be used to evaluate the project.

(3) *Exhibit No. 3.* A statement setting forth in detail the budget proposed for the project, together with procedures for fiscal control, funding, accounting and auditing to assure proper disbursement of funds paid to the applicant.

(4) *Exhibit No. 4.* Documentation establishing that the applicant has coordinated the travel promotion project with other States (when regional cooperation is desirable) and with other publicly supported activities within the States or political subdivision, as appropriate, and the extent and manner in which such coordination has been carried out by identifying such projects and activities and indicating how any duplication of other travel promotion project in the area has been avoided.

(5) *Exhibit No. 5.* Certification by the Governor of the State or the chief political officer of the political subdivision or the president of the private or public nonprofit organization, as the case may be, that the applicant has:

(i) Established adequate standards and rules to insure that no officer or employee of the State or political subdivision or their designated agencies, or private or public organization, shall receive compensation from sources other than his employer for tourism development or promotional services for which funds are provided under the Act and that no such officer or employee shall otherwise maintain any private interest in conflict with his public responsibility. Each applicant will furnish a copy of the standards and rules which are established to avoid any conflict of interest in connection with the administration of a grant which may be made under the Act. Such rules shall clearly set forth the standards and procedures which officers, employees, and consultants can follow to avoid any conflict of interest.

(ii) Determined that matching funds will be available from States or other non-Federal sources. In addition, each applicant shall indicate the basis for the determination by identifying such sources.

(iii) Determined that such travel promotional project supported by a grant under the Act does not provide or arrange transportation for, or accommodations to, persons traveling between foreign countries and the States in competition with any private business engaged in providing or arranging for such transportation and accommodations.

(iv) Planned no services specially related to a particular firm or company, public work or other capital project except insofar as the services are of general concern to the industry and commerce of the State or political subdivision. If the applicant has planned services which are specially related to a particular firm or company, public work or other capital project, a statement shall be furnished by the applicant to the Assistant Secretary describing such services and the basis for the determination that such services are of general concern to the industry and commerce of the State or political subdivision.

[36 FR 17036, Aug. 27, 1971, as amended at 55 FR 53489, December 31, 1990]

§ 1200.4 Action on application.

(a) Upon receipt of an application, the Assistant Secretary shall designate an employee of the U.S. Travel and Tourism Administration who will investigate the application and accompanying exhibits for compliance with the provisions of § 1200.3 and report his findings with respect thereto to the Assistant Secretary.

(b) The Assistant Secretary, within a reasonable time after receipt of the report referred to in paragraph (a) of this section, may authorize a grant to the applicant provided he finds that (1) the travel promotional project is designed to carry out the purposes of the Act; (2) the project will facilitate and encourage travel to the State or political subdivision or combination thereof by foreign residents; and (3) matching funds will be available from State or other non-Federal sources.

(c) In no event shall the amount of any grant made under the regulations of this part for any travel promotion project exceed 50 percent of the total cost of the project.

[36 FR 17036, Aug. 27, 1971, as amended at 55 FR 53489, December 31, 1990]

§ 1200.5 Grant accounting and records.

(a) Accounting for grants funds shall consist of any generally accepted accounting system and internal control procedures, including provisions for audit, provided that they meet the following requirements:

(1) Separate ledger accounts are established for each grant or grant project which conforms to or permits ready identification with grant budget categories. Such accounts should provide separate and specific accountability of receipts, expenditures, and balances. Separate accounts may be maintained for each annual period, but are not required.

(2) Supporting records of project expenditures are maintained in sufficient detail and itemization to show the exact nature of each expenditure. Such records should clearly indicate to which major budget category and subitems within the category an expenditure is charged.

(3) Reimbursements of travel expenses are supported by vouchers containing the signature of the individual performing the travel and the person authorized by the applicant to approve such travel. Vouchers should show the starting point and destination of travel, dates of travel, itemization of amounts expended for transportation and a statement of the amounts expended for transportation and a statement of the amount of per diem due (not to exceed the per diem authorized by the State or political subdivision or the rate of $25 per day (whichever is less)).

(4) Each expenditure is referenced to a supporting purchase order, contract, voucher, invoice, or bill, properly approved. Special voucher forms are not necessary since ordinarily the documents used by a designated agency to support expenditures from its own funds will be sufficient. Whenever pos-

sible, separate orders should be issued for purchases charged to grant funds in order that bills or invoices will not contain items charged to other funds.

(5) Grant number, account number, date, and expense classification are identified on invoices or vouchers charged to other funds.

(6) Payroll authorizations are maintained to effect control on salaries and wages charged against grant funds. These authorizations shall be approved by the appropriate authority in the State or political subdivision.

(7) Some objective evidence of time devoted to the grant project is maintained. As a minimum, a statement should be prepared at the end of each pay period showing the names of employees, the percentage of time each devoted to grant projects, the gross amounts of salaries and approval by appropriate authority in the designated agency.

(8) Adequate records are maintained supporting charges for fringe benefits, such as pensions, retirement, social security tax (FICA), etc., when included in the project budgets.

(9) All canceled checks are filed and are readily accessible for examination. When cash disbursements are made, they must be supported by receipts approved by appropriate authority.

(10) The accounting system is adequate to permit immediate identification of project balances and funds in general accounts, or separate bank accounts may be established for project funds.

(11) Inventory records are maintained for all equipment purchased with grant funds.

(12) The applicant receiving Federal funds under the Act shall require all subcontractors to provide documentation covering receipt and expenditure of grant and matching funds for which the designated agency is held responsible.

(13) The grant accounting system provides for adequate internal audits and the use of written policies and instructions defining accounting policies, procedures and controls.

(14) All income from project activity (sale of publications, entrance fees, user charges, etc.) is accounted for and clearly identified in financial reports.

[36 FR 17036, Aug. 27, 1971, as amended at 55 FR 53489, Dec. 31, 1990]

§ 1200.6 Reports.

Financial reports and descriptive reports will be required as the Assistant Secretary may specify. Each applicant is also required to submit to the Assistant Secretary within 90 days after the official termination date of the grant (a) a final financial report, and (b) a descriptive report describing and evaluating the project accomplishments.

§ 1200.7 Inspection and audit.

(a) The Assistant Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the purpose of audit and examination, any books, documents, papers, and records of the designated agency that are pertinent to Federal assistance received under the Act.

(b) Financial records must be kept on file for a minimum of 3 years following the termination of the grant. The required retention period may be extended by written notification by the Assistant Secretary.

§ 1200.8 Publications.

(a) If the applicant desires to publish information resulting from the grant, the general provisions accompanying the grant will contain regulations regarding acknowledgment and disclaimer requirements.

(b) A determination as to responsibilities will be made on a case-by-case basis; however, the Government reserves a nonexclusive license to use and reproduce for Government purposes, without payment, any publishable matter or information collected, including copyrighted material, arising out of the applicant's activities.

§ 1200.9 Collection of information.

If the applicant collects information from the public on its own initiative in connection with a research or other general purpose project, it will not, without prior written approval of the Assistant Secretary, in any way represent that the information is being collected by or for a Federal agency.

§ 1200.10 Termination.

(a) Grants may be terminated, in whole or in part, by the Assistant Secretary if he finds that any of the following conditions exist:

(1) The applicant, or those with whom such agency has contracted or subcontracted, is not complying with the provisions of the Act, with the regulations in this part, or with any of the provisions of the grant; or

(2) Any funds paid to the applicant under the provisions of the Act or the regulations in this part have been lost, misapplied, or otherwise diverted from or improperly used or expended for other than the purposes for which they were paid.

(b) The Assistant Secretary may, in his sole discretion, terminate the grant, in whole or in part, if he finds that any of the conditions described in paragraph (a) of this section exist. Such termination shall be effective 30 days after the mailing of a written notice of termination to the applicant.

§ 1200.11 Repayment.

In the event that the grant is terminated, any funds that have been paid to the applicant by the U.S. Travel and Tourism Administration which have not been expended or contracted for upon receipt of the notice of termination shall be repaid to the Assistant Secretary within 30 days of such notice.

[36 FR 17036, Aug. 27, 1971, as amended at 55 FR 53489, December 31, 1990]

§ 1200.12 Federal coordination.

The Assistant Secretary may, prior to approving any travel promotional project, take such steps as he deems appropriate, to coordinate such project with other Federal agencies or seek the advice of such committees as may be established for the purpose of reviewing tourist development or promotion plans and programs.

CHAPTER XIII—EAST-WEST FOREIGN TRADE BOARD

(Parts 1300-1399)

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PART 1300—REPORTS ON EXPORTS OF TECHNOLOGY

§ 1300.1 Reporting of exports of technology to nonmarket economy countries.

(a) For purposes of complying with the reporting requirements of section 411 of the Trade Act of 1974 (19 U.S.C. 2441) relating to the export of technology to a nonmarket economy country, exporters of such technology shall be deemed to have complied with the requirements of such section by complying with the applicable provisions of the export control regulations of the Department of Commerce (15 CFR 368.1 through 399.2) issued pursuant to the Export Administration Act of 1969, as amended, (50 U.S.C. App. 2401 through 2413).

(b) Nonmarket Economy Country. For purposes of section 411(b) of the Trade Act of 1974 (19 U.S.C. 2441) the term "nonmarket economy country" includes those countries included in Country Groups Q, W, Y, and Z of the export control regulations of the Department of Commerce (15 CFR Part 370 (Supplement 1)).

(Sec. 411, Pub. L. 93-618, 88 Stat. 2065 (19 U.S.C. 2441); E.O. 11846 (40 FR 14291))

[40 FR 29534, July 14, 1975]

CHAPTER XIV—MINORITY BUSINESS DEVELOPMENT AGENCY

(Parts 1400–1499)

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PART 1400—DETERMINATION OF GROUP ELIGIBILITY FOR MBDA ASSISTANCE

Sec.
1400.1 Purpose and scope.
1400.2 Definitions.
1400.3 Request for determination.
1400.4 Evidence of social or economic disadvantage.
1400.5 Decision.
1400.6 Construction.

AUTHORITY: 15 U.S.C. 1512, E.O. 11625, 3 CFR 616 (1971-75), 36 FR 19967 (1971); and E.O. 12432, 3 CFR 198 (1983), 48 FR 32551 (1983).

SOURCE: 49 FR 42698, Oct. 24, 1984, unless otherwise noted.

§ 1400.1 Purpose and scope.

(a) The purpose of this part is to set forth regulations for determination of group eligibility for MBDA assistance.

(b) In order to be eligible to receive assistance from MBDA funded organizations, a concern must be a minority business enterprise. A minority business enterprise is a business enterprise that is owned or controlled by one or more socially or economically disadvantaged persons. Executive Order 11625 designates Blacks, Puerto-Ricans, Spanish-speaking Americans, American Indians, Eskimos, and Aleuts as persons who are socially or economically disadvantaged and thus eligible for MBDA assistance. Other groups designated are listed below in paragraph (c). The purpose of this regulation is to provide guidance to groups not previously designated as eligible for assistance who believe they are entitled to formal designation as "socially or economically disadvantage" under the Executive Order. Upon adequate showing by representatives of the group that the group is, as a whole, socially or economically disadvantaged the group will be so designated and its members will be eligible for MBDA assistance. Designation under Executive Order 11625 establishes eligibility status only for MBDA funded programs. It will not establish eligibility for any other Federal or Federally funded program.

(c) In addition to those listed in E.O. 11625, members of the following groups have been designated as eligible to receive assistance: Hasidic Jews, Asian Pacific Americans, and Asian Indians.

§ 1400.2 Definitions.

For the purpose of this part:

(a) Minority business enterprise means a business which is owned or controlled by one or more socially or economically disadvantaged persons.

(b) Socially disadvantaged persons means those persons who have been subjected to cultural, racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities.

(c) Economically disadvantaged persons means those persons whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities because of their identity as members of a group without regard to their individual qualities, as compared to others in the same line of business and competitive market area.

(d) Person means a citizen of the United States or an alien lawfully admitted for permanent residence.

§ 1400.3 Request for determination.

A group wishing to apply for designation as socially or economically disadvantaged under Executive Order 11625 shall submit a written application to the Director of the Minority Business Development Agency, United States Department of Commerce, Washington, D.C., 20230, containing the following information:

(a) *Statement of request:* a brief statement clearly indicating that the applicant seeks formal recognition as socially or economically disadvantaged.

(b) *Description of applicants:* a detailed sociological, ethnic and/or racial description, as appropriate, of the group they represent which indicates that the group and the traits of its members are sufficiently distinctive to warrant a determination of social or economic disadvantage.

(c) *Summary of the applicant's submission:* a brief summary of their Submission.

(d) *Presentation of argument:* a narrative description of the documentation in support of their claim of social or economic disadvantage.

(Applicants should support their claim of social or economic disadvantage with the criteria described under 1400.4 "Evidence of Social or Economic Disadvantage")

(e) *Conclusion:* summary of applicant's arguments in support of the claims of social or economic disadvantage.

(Approved by the Office of Management and Budget under control number 0640-0011)

§ 1400.4 Evidence of social or economic disadvantage.

(a) The representatives of the group requesting formal designation should establish social or economic disadvantage by a preponderance of the evidence. Social or economic disadvantage must be chronic, long standing, and substantial, not fleeting or insignificant. In determining whether a group has made an adequate showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, a determination will be made as to whether this group has suffered the effects of discriminatory practices over which its members have no control. Applicants must demonstrate that such social or economic conditions have produced impediments in the business world for members of the group which are not common to all business people in the same or similar business and market place.

(b) Evidence which will be considered in determining whether groups are socially or economically disadvantaged includes but is not limited to:

(1) Statistical profile outlining the national income level and standard of living enjoyed by members of the group in comparison to the income level and standard of living enjoyed by individuals not considered to be members of socially or economically disadvantaged groups.

(2) Evidence of employment discrimination suffered by members of the group in comparison to employment opportunities available to individuals not considered to be members of socially or economically disadvantaged groups.

(3) Evidence of educational discrimination in comparison to educational opportunities available to individuals not considered to be members of socially or economically disadvantaged groups.

(4) Evidence of denial of access to organizations, groups, or professional societies, whether in business or in school, based solely upon racial and/or ethnic considerations.

(5) Kinds of businesses and business opportunities available to group members in comparison to the kinds of businesses and business opportunities available to individuals not considered to be members of socially or economically disadvantaged groups.

(6) Availability of capital to group members in comparison to the availability of capital to individuals not considered to be members of socially or economically disadvantaged groups.

(7) Availability of technical and managerial resources to group members in comparison to the technical and managerial resources available to individuals not considered to be members of socially or economically disadvantaged groups.

(8) Any other evidence of denial of opportunity or access to those things which would enable the individual to participate more successfully in the American economic system, available to individuals not considered to be members of social or economically disadvantaged groups.

§ 1400.5 Decision.

(a) *Procedure.* After receipt of an application requesting formal designation as a socially or economically disadvantaged group, the Department of Commerce will publish a notice in the FEDERAL REGISTER that formal designation of this group will be considered. This notice will request comment from the public on the propriety of such a designation. The Department may gather additional information which supports or refutes the group's request. Any member of the public, including Government representatives, may submit information in written form. It is the responsibility of the applicant, however, to submit all relevant information which it wishes considered in its request for a determination of group eligibility.

(b) *Decision.* A decision will be made within 180 days of the receipt of the request. The decision will be published in the FEDERAL REGISTER. Applicants will also be informed in writing.

(c) *Appeal.* All questions of eligibility and procedural requirements shall be resolved by the Director, MBDA whose decision shall be final. An applicant may appeal this decision to the Secretary of Commerce. Applicants requesting an appeal should provide any information discovered subsequent to the Director's initial decision which would further their claim. The right to appeal shall be granted at the absolute discretion of the Secretary.

§ 1400.6 Construction.

Nothing in this regulation shall be construed as subjecting any functions vested in, or assigned pursuant to law to any Federal department or agency or head thereof to the authority of any other agency or office exclusively, or as abrogating or restricting such functions in any manner.

Subtitle C—Regulations Relating to Foreign Trade Agreements

CHAPTER XX—OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

(Parts 2000–2099)

EDITORIAL NOTE: Nomenclature changes affecting Chapter XX appear at 45 FR 12214, Feb. 25, 1980.

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PART 2001—CREATION, ORGANIZATION, AND FUNCTIONS

Sec.
2001.0 Scope and purpose.
2001.1 Creation and location.
2001.2 Organization.
2001.3 Functions.

AUTHORITY: Pub. L. 93-618, 88 Stat. 1978; 76 Stat. 902, 19 U.S.C. 1872, as amended; E.O. 11846 of March 27, 1975, 40 FR 14291, March 31, 1975.

SOURCE: 40 FR 18419, Apr. 28, 1975, unless otherwise noted.

§ 2001.0 Scope and purpose.

(a) This chapter sets out terms of reference of the Office of the United States Trade Representative (hereinafter the "Office"), and the procedures whereby it carries out its general responsibilities under the trade agreements program.

(b) One of the primary purposes of these regulations is to inform the public of the unit known as the Trade Policy Staff Committee, which replaces and assumes the functions formerly performed by The Trade Staff Committee and the Trade Information Committee. One of the functions of the Trade Policy Staff Committee is to afford an opportunity for interested parties to present oral and written statements concerning the trade agreements program and related matters.

§ 2001.1 Creation and location.

(a) The Office was established as an agency in the Executive Office of the President by Executive Order 11075 of January 15, 1963 (28 FR 473), as amended by Executive Order 11106 of April 18, 1963 (28 FR 3911), and Executive Order 11113 of June 13, 1963 (28 FR 6183). The Office subsequently was reestablished as an agency in the Executive Office of the President by section 141 of the Trade Act of 1974 (Pub. L. 93-618, 88 Stat. 1978, hereinafter referred to as the "Trade Act"), and was delegated certain functions under the Trade Act by Executive Order 11846 of March 27, 1975.[1]

(b) The Office is located at 1800 G Street NW., Washington, DC 20506.

§ 2001.2 Organization.

(a) The Office is headed by the United States Trade Representative (hereinafter, the "Trade Representative") as provided in section 141(b)(1) of the Trade Act. The Trade Representative reports directly to the President and the Congress as described in § 2001.3(a)(2) of this part, and has the rank of Ambassador Extraordinary and Plenipotentiary.

(b) The Office also consists of two Deputy Trade Representatives (hereinafter "Deputy Trade Representatives") as provided in section 141(b)(2) of the Trade Act, each of whom holds the rank of Ambassador, and of a professional and nonprofessional staff.

(c) The Trade Policy Committee, an interagency committee composed of the heads of specified Executive departments and offices, was established by section 3 of Executive Order 11846 (see Appendix), as authorized by section 242(a) of the Trade Expansion Act of 1962, as amended,[2] under the chairmanship of the United States Trade Representative, as provided by section 141(c)(1)(E) of the Trade Act. Two subordinate bodies of the Trade Policy Committee, the Trade Policy Committee Review Group, and the Trade Policy Staff Committee, provided for in §§ 2002.1 and 2002.2 respectively, are established by, and under the direction and administrative control of the Trade Representative.

§ 2001.3 Functions.

(a) The Trade Representative:

(1) Except where otherwise provided by statute, Executive order, or instructions of the President, is the chief representative of the United States for each negotiation under the trade agreements program as defined in section 1 of Executive Order 11846, and participates in other negotiations which may have a direct and significant impact on trade;

(2) Reports directly to the President and the Congress, and is responsible to

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[1] 40 FR 14291, March 31, 1975.

[2] 76 Stat. 902, 19 U.S.C. 1872; Pub. L. 93-618, 88 Stat. 1978, section 602(b).

the President and the Congress, with respect to the administration of the trade agreements program as defined in section 1 of Executive Order 11846;

(3) Advises the President and the Congress with respect to tariff and nontariff barriers to international trade, international commodity agreements, and other matters which are related to the trade agreements program;

(4) Performs the functions of the President under section 102 of the Trade Act concerning notice to, and consultation with, Congress, in connection with agreements on nontariff barriers to, and other distortions of, trade, and prepares for the President's transmission to Congress all proposed legislation and other documents necessary or appropriate for the implementation of, or otherwise required in connection with, trade agreements (except that where implementation of an agreement on nontariff barriers to, and other distortions of trade requires a change in a domestic law, the department or agency having the primary interest in the administration of such domestic law prepares and transmits to the Trade Representative any proposed legislation necessary for such implementation);

(5) Is responsible for making reports to Congress with respect to the matters set forth in paragraphs (a) (1) and (2) of this section and prepares, for the President's transmission to Congress, the annual report on the trade agreements program required by section 163(a) of the Trade Act ;

(6) Is chairman of the Trade Policy Committee, and designates the chairman of the Trade Policy Committee Review Group and the Trade Policy Staff Committee, which are provided for in Part 2002 of these regulations;

(7) Is responsible for the preparation and submission of any Proclamation which relates wholly or primarily to the trade agreements program;

(8) Performs the functions of the President under section 131(c) of the Trade Act concerning requests for, and receipt of, advice from the International Trade Commission with respect to modifications of barriers to (and other distortions of) international trade;

(9) Performs the functions of the President under section 132 of the Trade Act with respect to advice of departments of the Federal government and other sources, and under section 133 of the Trade Act with respect to certain public hearings;

(10) Performs the functions of the President under section 135 of the Trade Act with respect to advisory committees, (including functions under the Federal Advisory Committee Act, 86 Stat. 770, 5 U.S.C. App. 1, which are applicable to such committees, except that of reporting annually to Congress), and, acting through the Secretaries of Commerce, Labor, and Agriculture, as appropriate, performs the functions of the President in establishing and organizing general policy advisory committees and sector advisory committees under section 135(c) of the Trade Act;

(11) Determines ad valorem amounts and equivalents pursuant to sections 601 (3) and (4) of the Trade Act, taking into account advice from the International Trade Commission and in consultation with the Trade Policy Committee;

(12) Requests, where appropriate, information from the International Trade Commission in connection with import relief findings or actions under sections 202(d) and 203(i) (1) and (2) of the Trade Act;

(13) Acting through the Section 301 Committee provided for in § 2002.3 of this chapter as appropriate, provides opportunities for the presentation of views under sections 301(d) and 301(e) of the Trade Act, with respect to certain foreign restrictions, acts, practices or policies and United States actions in response thereto;

(14) At the request of a complainant, made in accordance with § 2003.3 of these regulations, under section 301(d)(2) of the Trade Act, or of an interested person under section 301(e)(2), provides for appropriate public hearings by the Trade Policy Staff Committee on alleged foreign restrictions, acts, policies, or practices under section 301(d)(2), and on any action by the United States with respect to the import treatment of any foreign product or the treatment of

any foreign service under section 301(e)(2);

(15) Requests, where appropriate, the views of the International Trade Commission as to the probable impact on the economy of the United States of any action under section 301(a) of the Trade Act;

(16) Is responsible, in consultation with the Secretary of State, for the administration of the generalized system of preferences under Title V of the Trade Act;

(17) Is responsible for such other functions as the President may direct.

(b)(1) Each Deputy Trade Representative shall have as his principal function the conduct of trade negotiations under this Act, and shall have such other functions as the Trade Representative may direct;

(2) A Deputy Trade Representative, designated by the Trade Representative, is chairman of the Trade Policy Committee Review Group provided for in § 2002.1;

(3) A Deputy Trade Representative, designated by the Trade Representative, is chairman of the Adjustment Assistance Coordinating Committee established by section 281 of the Trade Act.

[40 FR 18419, Apr. 28, 1975, as amended at 40 FR 39497, Aug. 28, 1975]

PART 2002—OPERATION OF COMMITTEES

Sec.

2002.0 Trade Policy Committee.
2002.1 Trade Policy Committee Review Group.
2002.2 Trade Policy Staff Committee.
2002.3 Section 301 Committee.
2002.4 Participation by other agencies.

Authority: Pub. L. 93-618, 88 Stat. 1978; 76 Stat. 902, 19 U.S.C. 1872, as amended; E.O. 11846 of March 27, 1975, 40 FR 14291, March 31, 1975.

§ 2002.0 Trade Policy Committee.

(a) The Trade Policy Committee was created by section 3 of Executive Order 11846 of March 27, 1975 (40 FR 14291, March 31, 1975), as authorized by section 242(a) of the Trade Expansion Act of 1962 (19 U.S.C. 1872), as amended by section 602(b) of the Trade Act.

(b) The Trade Policy Committee is composed of:

(1) The Special Representative for Trade Negotiations, Chairman;

(2) The Secretary of State;

(3) The Secretary of the Treasury;

(4) The Secretary of Defense;

(5) The Attorney General;

(6) The Secretary of the Interior;

(7) The Secretary of Agriculture;

(8) The Secretary of Commerce;

(9) The Secretary of Labor;

(10) The Assistant to the President for Economic Affairs;

(11) The Executive Director of the Council on International Economic Policy.

In addition, the Committee may invite the participation in its activities of any agency or office not listed above when matters of interest to such agency or office are under consideration.

(c) The Trade Policy Committee meets at such times and with respect to such functions as the President or the Chairman of the Committee directs. It has the functions conferred by the Trade Expansion Act of 1962, as amended, upon the interagency organization referred to in section 242 thereof, as amended, the functions delegated to it by the provisions of Executive Order 11846 (see Appendix), and such other functions as the President or the chairman may from time to time direct. Recommendations and advice of the Committee are submitted to the President by the chairman.

[40 FR 18420, Apr. 28, 1975]

§ 2002.1 Trade Policy Committee Review Group.

(a) The Trade Executive Committee, established by regulations appearing by 36 FR 23620, December 11, 1971 (15 CFR 2002.1), is abolished and there is hereby established as a subordinate body of the Trade Policy Committee the Trade Policy Committee Review Group (hereinafter referred to as the "Review Group"). The Review Group consists of a Deputy Trade Representative, designated by the Trade Representative, as chairman, and of high level officials designated from their respective agencies or offices by the Secretaries of Agriculture, Commerce, Defense, Interior, Labor, State and Treasury, and the Executive Director of the Council on International Economic Policy. The Special Representative or the Deputy Special Representative, as appropriate, and each head of an agency or office, may designate from his respective agency or office high level officials to serve as alternate members of the Review Group in the event the regular member is unable to attend any meeting of the Review Group.

(b) The Review Group performs the following functions unless such functions are assigned to a different body by the Special Representative or his designee:

(1) Coordinates interagency activities concerning the trade agreements program and related matters;

(2) Recommends policies and actions, and transmits appropriate materials, to the Special Representative concerning the trade agreements program and related matters, or, when appropriate, approves such policies and actions; and

(3) As appropriate, reviews and approves recommendations of the Trade Policy Staff Committee on policies and actions concerning any proposed trade agreements, the trade agreements program, and related matters.

(4) [Reserved]

(5) Performs such other functions as the Special Representative or a Deputy Special Representative may from time to time direct.

[40 FR 18420, Apr. 28, 1975, as amended at 40 FR 39497, Aug. 28, 1975; 40 FR 60042, Dec. 31, 1975; 42 FR 55611, Oct. 18, 1977]

§ 2002.2 Trade Policy Staff Committee.

(a) The Trade Staff Committee and the Trade Information Committee, established by regulations appearing at 36 FR 23620, December 11, 1971 (15 CFR 2002.2, and 2002.3, respectively) are abolished and there is hereby established as a subordinate body of the Trade Policy Committee and the Trade Policy Review Group the Trade Policy Staff Committee (hereinafter referred to as "the Committee"). The Committee consists of a chairman designated by the Special Representative from his Office, and of senior trade policy staff officials designated from their respective agencies or offices by the Secretaries of Agriculture, Commerce, Defense, Interior, Labor, State, and Treasury, by the Executive Director of the Council on International Economic Policy," so that the sentence reads: The Committee consists of a chairman designated by the Special Representative from his Office, and of senior trade policy staff officials designated from their respective agencies or offices by the Secretaries of Agriculture, Commerce, Defense, Interior, Labor, State, and Treasury, by the Executive Director of the Council on International Economic Policy, and by the Chairman of the International Trade Commission. Each Secretary or head of an agency or office and the Chairman of the Commission may designate from his respective agency officials to serve as alternate members of the Committee in the event the regular member is unable to attend any meeting of the Committee. The Special Representative may from time to time designate officials from his agency other than the chairman, to serve as acting chairmen of the Committee. The representative of the International Trade Commission shall be a nonvoting member of the Committee.

(b) The Committee performs the following functions unless such functions are assigned to a different body by the Special Representative or his designee:

(1) Monitors the trade agreements programs, reviews the information received pursuant to paragraphs (b) (2) through (8) of this section, and transmits summaries of such information together with recommendations of action to the Special Representative, or through him to the Trade Policy Review Group or the Trade Policy Committee, concerning the trade agreements program and related matters, or when appropriate approves such policies and actions.

(2) Obtains information and advice from the Departments of Agriculture, Commerce, Defense, Interior, Labor, State and the Treasury, from the Office of the Special Representative for Trade Negotiations, and from such other sources as the Special Repre-

sentative, a Deputy Special Representative, or the Chairman of the Committee may deem appropriate concerning any proposed trade agreement and other aspects of the trade agreements program and related matters, and concerning the Generalized System of Preferences in accordance with Title V of the Trade Act;

(3) Provides an opportunity. by the holding of public hearing and by such other means as the Special Representative, the Deputy Special Representative or the Chairman of the Committee deems appropriate, for interested persons to present their views concerning any article on a list published pursuant to section 131 of the Trade Act, any article which should be so listed, any concession which should be sought by the United States, or any other matter relevant to a proposed trade agreement;

(4) Provides an opportunity, by the holding of public hearings and by such other means as the Special Representative, a Deputy Special Representative, or the Chairman of the Committee deems appropriate, for any interested party to present by oral or written statement his views concerning articles being considered for designation as eligible articles for purposes of the Generalized System of Preferences;

(5) [Reserved]

(6) Provides an opportunity where deemed appropriate by the Special Representative, the Deputy Special Representative, or the Chairman, by the holding of public hearings upon request by an interested party, and by such other means as the Special Representative, the Deputy Special Representative or the Chairman deems appropriate, for any interested party to present an oral or written statement concerning any other aspect of the trade agreements program and related matters;

(7) Reviews all materials required to be furnished by the International Trade Commission to the President through the Special Representative, and transmits such materials, together, where appropriate with recommendations of action with respect thereto, to the Special Representative or a Deputy Special Representative.

(8) Reviews reports of hearings and reviews conducted by the section 301 Committee provided for in § 2002.3 and recommendations resulting therefrom, and makes recommendations to the Special Representative with respect thereto.

(9) When circumstances warrant, terminates section 301 reviews provided for in § 2002.3

(10) Receives and reviews requests pertaining to the duty-free treatment accorded to articles under the Generalized System of Preferences, and handles such requests and reviews in accordance with Part 2007 of these regulations;

(11) Issues regulations governing the conduct of its public hearings and the performance of such of its other functions as it deems necessary;

(12) Performs such other functions as the Special Representative or the Deputy Special Representative may from time to time direct.

[40 FR 18420, Apr. 28, 1975, as amended at 40 FR 39497, Aug. 28, 1975; 40 FR 60042, Dec. 31, 1975; 42 FR 55611, Oct. 18, 1977]

§ 2002.3 Section 301 Committee.

(a) There is hereby established, as a subordinate body of the Trade Policy Staff Committee, the Section 301 Committee. The Chairman of the Section 301 Committee shall be designated by the Deputy Special Representative from the Office of the Special Representative for Trade Negotiations. The Committee shall consist of the Chairman and, with respect to each complaint, such members as may be designated by agencies which have an interest in the issues raised by the particular complaint and whose participation is invited by the Chairman of the Committee.

(b) The Section 301 Committee performs the following functions unless such functions are assigned to a different body by the Special Representative, or his designee:

(1) Reviews complaints received pursuant to section 301 of the Trade Act of 1974.

(2) Provides an opportunity by the holding of public hearings upon request by a complainant or an interested party, as appropriate, and by such

other means as the Special Representative, a Deputy Special Representative or the Chairman of the section 301 Committee deems appropriate, for any interested party to present his views to the section 301 Committee concerning foreign restrictions, acts, policies, and practices affecting U.S. commerce, and United States actions in response thereto, as provided for in section 301 of the Trade Act (Pub. L. 93-618, 88 Stat. 1978).

(3) Reports to the Trade Policy Staff Committee the results of reviews and hearings conducted with respect to complaints received pursuant to section 301 of the Trade Act.

(4) On the basis of its review of petitions filed under section 301 and of the views received through hearings or otherwise on such petitions, makes recommendations to the TPSC for review by that committee.

[40 FR 39497, Aug. 28, 1975, as amended at 42 FR 55611, Oct 18, 1977]

§ 2002.4 Participation by other agencies.

The chairman of the Trade Policy Committee, the Trade Policy Committee Review Group, the Section 301 Committee, and the Trade Policy Staff Committee may invite the participation in the activities of their committees of any other agencies when matters of interest to such agencies are under consideration.

[40 FR 18420, Apr. 28, 1975. Redesignated and amended at 40 FR 39497, Aug. 28, 1975]

PART 2003—REGULATIONS OF TRADE POLICY STAFF COMMITTEE

Sec.
2003.0 Office, mailing address, telephone number, and hours.
2003.1 Notice of public hearings.
2003.2 Testimony and submission of written briefs.
2003.3 [Reserved]
2003.4 Presentation of oral testimony at public hearings.
2003.5 Information open to public inspection.
2003.6 Information exempt from public inspection.

Authority: Pub. L. 93-618, 88 Stat. 1978; 76 Stat. 902, 19 U.S.C. 1872, as amended; E.O. 11846 of March 27, 1975, 40 FR 14291, March 31, 1975.

Source: 40 FR 18421, Apr. 28, 1975, unless otherwise noted.

§ 2003.0 Office, mailing address, telephone number, and hours.

(a) The office of the Committee is at Room 729, 1800 G Street NW., Washington, DC 20506.

(b) All communications to the Committee should be addressed to the "Secretary, Trade Policy Staff Committee, Office of the Special Representative for Trade Negotiations, Room 729, 1800 G Street, NW., Washington, DC 20506."

(c) The telephone number of the office of the Committee is (202) 395-3395.

(d) The regular hours of the office of the Committee are from 9 a.m. to 5:30 p.m. on each business day, Monday through Friday.

§ 2003.1 Notice of public hearings.

The Committee shall publish in the Federal Register a notice of a proposed public hearing, the subject matter of the proposed public hearing, the period during which written briefs may be submitted, the period during which requests may be submitted to present oral testimony, and the time and place of the proposed public hearing, in the following instances:

(a) Upon publication of lists of articles by the President under section 131(a), or sections 503(a) and 131(a), of the Trade Act as a result of which public hearings are required to be held by section 133 of the Trade Act with respect to any matter relevant to a proposed trade agreement, or with respect to any matter relevant to the granting of generalized tariff preferences for the listed articles;

(b) Whenever the Special Representative or the Deputy Special Representative determines that public hearings in connection with the review of a request submitted pursuant to Part 2007 of these regulations, pertaining to the duty-free treatment accorded to articles under the GSP, are in the public interest.

(c) Upon instructions of the Special Representative.

[40 FR 18421, Apr. 28, 1975, as amended at 40 FR 39498, Aug. 28, 1975; 40 FR 60042, Dec. 31, 1975]

§ 2003.2 Testimony and submission of written briefs.

(a) Participation by an interested party in a public hearing announced under § 2003.1 shall require the submission of a written brief before the close of the period announced, in the public notice for its submission. Such brief may be, but need not be, supplemented by the presentation of oral testimony in accordance with § 2003.4.

(b) A written brief by an interested party concerning any aspect of the trade agreements program or any related matter not subject to paragraph (a) of this section, and submitted pursuant to a public notice shall be submitted before the close of the period announced in the public notice for its submission.

(c) A written brief shall state clearly the position taken and shall describe with particularity the evidence supporting such position. It shall be submitted in not less than twenty (20) copies which shall be legibly typed, printed, or duplicated.

(d) In order to assure each party an opportunity to contest the information provided by other interested parties, the Committee will entertain rebuttal briefs filed by any party within a time limit specified by the Committee. Rebuttal briefs shall conform, in form and number, to the provisions of paragraph (c) of this section. Rebuttal briefs should be strictly limited to demonstrating errors of fact or analysis not pointed out in the briefs or hearings and should be as concise as possible.

(e) A written brief by an interested party concerning any aspect of the Trade Agreements Program or any related matter not subject to paragraph (a) or (b) of this section may be submitted at any time.

(f) The requirements in paragraphs (a) through (d) of this section may be waived by the Special Representative, the Deputy Special Representative, or the Chairman of the Committee for reasons of equity and the public interest.

[40 FR 18421, Apr. 28, 1975, as amended at 40 FR 39498, Aug. 28, 1975]

§ 2003.3 [Reserved]

§ 2003.4 Presentation of oral testimony at public hearings.

(a) A request by an interested party to present oral testimony at a public hearing shall be submitted in writing before the close of the period announced in the public notice for its submission, and shall state briefly the interest of the applicant and the position to be taken by the applicant. Such request will be granted only if a written brief has been prepared and submitted in accordance with § 2003.2. The requirements of this subpart may be waived by the Special Representative, the Deputy Special Representative or the Chairman of the Committee for reasons of equity and the public interest.

(b) After receipt and consideration of a request to present oral testimony at a public hearing, the Secretary of the Committee shall notify the applicant whether the request conforms to the requirements of paragraph (a) of this section, and if so, the time and place for the hearing and for his appearance, and the amount of time allotted for his oral testimony, and if not, will give the reasons why the request does not conform to the requirements.

(c) In presenting testimony, the interested party should supplement the information contained in the written brief, and should be prepared to answer questions relating to such information.

(d) A stenographic record shall be made of every public hearing.

[40 FR 18421, Apr. 28, 1975, as amended at 40 FR 39498, Aug. 28, 1975]

§ 2003.5 Information open to public inspection.

(a) With the exception of information subject to § 2003.6, an interested party may, upon request, inspect at the office of the Committee:

(1) Any written request, brief, or similar submission of information;

(2) Any stenographic record of a public hearing;

(3) Other public written information concerning the trade agreements program and related matters.

§ 2003.6 Information exempt from public inspection.

(a) The Committee shall exempt from public inspection business information submitted by an interested party if the Committee determines that such information concerns or relates to trade secrets and commercial and financial information the disclosure of which is not authorized by the interested party furnishing such information and is not required by law.

(b) A party requesting that the Committee exempt from public inspection business information submitted in writing shall clearly mark each page "BUSINESS CONFIDENTIAL" at the top.

(c) The Committee may deny a request that it exempt from public inspection any particular business information if it determines that such information is not entitled to exemption under paragraph (a) of this section. In the event of such denial, the party submitting the particular business information will be notified of the reasons for the denial and will be permitted to withdraw his submission.

PART 2004—FREEDOM OF INFORMATION POLICIES AND PROCEDURES

Sec.
2004.1 General.
2004.2 Availability of records.
2004.3 [Reserved]
2004.4 Records which may be exempt from disclosure.
2004.5 Classified records and information from other agencies.
2004.6 Release or denial of request for records.
2004.7 Appeals.
2004.8 Time limits.
2004.9 Fees schedule.
2004.10 Fee payments.
2004.11 Current index.
2004.12 Annual report to Congress.

AUTHORITY: Pub. L. 93-618, 88 Stat. 1978, (5 U.S.C. 552), as amended by Pub. L. 93-502; (19 U.S.C. 2171).

SOURCE: 40 FR 30934, July 24, 1975, unless otherwise noted.

§ 2004.1 General.

This information is furnished for the guidance of the public and in compliance with the requirements of section 552 of Title 5, U.S.C. as amended.

§ 2004.2 Availability of records.

(a) All identifiable records of the Office of the Special Representative shall be made available to the public upon compliance with the procedures established in this part, except to the extent that a determination is made to withhold a record subject to exemption under 5 U.S.C. 552(b).

(b) All requests for records must be in writing and shall be addressed to Freedom of Information Officer, Office of the Special Representative for Trade Negotiations, 1800 G Street, NW., Washington, DC 20506. Requests should reasonably identify the particular record or records sought. Such a description, if possible, should include date, format, subject matter, office originating or receiving the record, and the name of any person to whom the record is known to relate.

§ 2004.3 [Reserved]

§ 2004.4 Records which may be exempt from disclosure.

(a) The following categories of records maintained by the Office of the STR may be exempted from disclosure:

(1) Records specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such executive order.

(2) Records related solely to the internal personnel rules and practices of the agency.

(3) Records specifically exempted from disclosure by statute, including but not limited to information relating to trade negotiations exempted under trade negotiations exempted under Pub. L. 93-618, section 135(g)(1) (A) and B and section 135(g)(2).

(4) Records of trade secrets and commercial or financial information obtained from a person and privileged or confidential.

(5) Records which are inter-agency or intra-agency memorandums, letters, telegrams, or airgrams which would not be available by law to a party other than an agency in litigation with the agency.

(6) Records such as personnel and medical files and similar files the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) Such other records that fall within exceptions noted in 5 U.S.C. 552(b) (7), (8) and (9).

(b) Any reasonably segregable non-exempt portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under paragraph (a) of this section. Normally a portion of a record shall be considered reasonably segregable when segregation can produce an intelligible record which is not distorted out of context and does not contradict the record being withheld.

§ 2004.5 Classified records and information from other agencies.

(a) A Classification Review Committee is hereby established within STR to make determinations on the applicability of the exemption for classified documents. The Committee will be chaired by a staff official designated by the Special Representative and will consist of the Chairman and 2 STR Officials designated by him who have authority to classify and declassify documents.

(b) The applicability of the exemption for classified information requires a determination that the record in question is specifically authorized under the criteria established by Executive Order 11652 to be kept classified and is in fact properly classified pursuant to that order. This determination shall be made whenever possible before the initial denial under § 204.4(a)(1). It must in any case be made prior to the decision of an appeal under § 2004.7. No denial should be based solely on the existence of a classification marking on the record, and there shall be a substantive review of the validity of the classification to the maximum extent feasible within the time limits for a denial under § 2004.4.

(c) When a request for a STR record encompasses classified information originated or received from another department or agency, the request for that information shall be referred to the originator or other source. The person requesting the record will be advised of the date and the addressee of the referral.

(d) The Classification Review Committee will, at the request of another agency, make recommendations on the release of material concerning "national defense or foreign policy" originally classified by another agency but which is of significant subject-matter interest to STR.

§ 2004.6 Release or denial of request for records.

Written requests for inspection or copying of records shall be granted or denied only by the Freedom of Information Officer or his designee. Responses to written requests shall be in writing, shall specify the reasons for any denial therefore, and shall advise the person requesting of the right to appeal any denial to the Freedom of Information Appeals Committee.

§ 2004.7 Appeals.

(a) A Freedom of Information Appeals Committee is hereby established, consisting of the Special Representative or his designee as chairman, and 3 STR staff officials designated by the Special Representative, none of whom were members of the Classification Committee which originally made the determination on the requested information.

(b) Review of an initial denial under § 2004.6 may be requested by the person who submitted the original request for a record. The review (hereinafter the appeal) must be requested in writing within 30 days of the date that the person requesting the record is informed either:

(1) That the request is denied completely, or

(2) That all records which are being furnished in response to his request have been released and he has been so informed.

(c) If the appeal is granted, the person making the appeal shall be immediately notified and copies of the releaseable documents shall be made available promptly thereafter upon receipt of appropriate fees as set forth in § 2004.9. If the appeal is denied in whole or part, the person making the request shall be immediately notified of the decision and of the provisions of judicial review of STR's denial of the request.

(d) In the event a determination is not issued within the appropriate time limit and the person making the request chooses to initiate a court action against STR, the determination process shall continue and the Freedom of Information Appeals Committee may review any initial denial of the requested record.

§ 2004.8 Time limits.

(a) An initial response under § 2004.6 shall be made within 10 days (exempting Saturdays, Sundays, and legal public holidays) after the receipt of a request for a record under this Part by the Freedom of Information Officer or his designee. An appeal under § 2004.7 shall be decided within 20 days (excepting Saturdays, Sundays and legal public holidays) after the receipt of such an appeal by the Appeals Committee.

(b) The time limits for initial decision and for an appeal decision begins on the date the request or appeal is actually received by STR. If requests or appeals not properly marked "Freedom of Information Request" or "Freedom of Information Act Appeal" on the request or appeal are inadvertently delayed in reaching the Freedom of Information Officer or the Appeals Committee they will not be deemed received by STR until actually received by the Freedom of Information Officer or Appeals Committee. In such event, the person making the request or appeal will be furnished a notice of the effective date of receipt.

(c) In unusual circumstances as specified in this paragraph, the Freedom of Information Officer or his designee may extend the time limits in paragraph (a) of this section by written notice to the person requesting a record under this part, which notice shall set forth the reasons for such extension and the date on which a determination or appeal decision is expected to be dispatched. No such notice shall specify a date which would result in an extension of either the initial determination period, or the appeal period, or both, for more than 10 working days. As used in this paragraph "unusual circumstances" means, but only to the extent reasonably necessary to the proper processing of the particular request:

(1) The need to search for and collect the requested records from overseas posts or other establishments that are separate from the office processing the request;

(2) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are demanded in a single request; or

(3) The need for consultations, which shall be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request, or among two or more components of the agency having substantial subject matter interest therein.

(d) Where the responsible official believes that further consideration of a request may result in the release of additional records or portions thereof, the expiration of the time period allocated by the Freedom of Information Officer or his designee does not require the termination of that consideration, and it should be continued with a view to maximum disclosure of requested records within a reasonable period of time.

§ 2004.9 Fees schedule.

(a) Fees schedule for the search and reproduction of information available under the Freedom of Information Act (5 U.S.C. 552), as amended:

(1) *Search for records.* Five dollars per hour when the search is conducted by a clerical employee. Eight dollars per hour when the search is conducted by a professional employee. No charge for searches of less than one hour.

(2) *Duplication of records.* Records will be duplicated at a rate of $.15 per

page for all copying of 4 pages or more.

(3) *Other.* When no specific fee has been established for a service, or the request for a service does not fall under one of the above categories due to the amount or type thereof, the Freedom of Information Act Officer is authorized to establish an appropriate fee based on "direct costs" as provided in the Freedom of Information Act. Examples of services covered by this provision include searches involving computer time or special travel, transportation, or communications costs.

(b) Search costs are due and payable even if the record which was requested cannot be located after all reasonable efforts have been made, or if the Freedom of Information Officer or his designee or the Freedom of Information Appeals Committee determines that a record which has been requested, but which is exempt from disclosure under the Act, is to be withheld. Processing of a request for records will not be undertaken until the person requesting a record has paid in full for search and duplication charges for any previous document request under the Act.

(c) Where it is anticipated that the fees chargeable under this section will amount to more than $25, and the person requesting the record has not indicated in advance his willingness to pay fees as high as are anticipated, the person so requesting shall be promptly notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. In instances where the estimated fees will greatly exceed $25, an advance deposit may be required. The notice or request for an advance deposit shall extend an offer to the person requesting the record to consult with the Administrative Officer of STR in an attempt to reformulate the request in a manner which will reduce the fees and meet the needs of the person requesting the record. Dispatch of such a notice or request shall suspend the running of the period for response by the Office of the STR until a reply is received from the person requesting the record.

(d) Fees must be paid in full prior to issuance of requested copies.

§ 2004.10 Fee payments.

(a) Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the Treasurer of the United States and mailed to "the Administrative Officer", STR, 1800 G St. NW., Washington, DC 20506.

(b) A receipt for fees paid will be given only upon request. Refund of fees paid for services actually rendered will not be made.

(c) The STR Administrative Officer, may in accordance with the Freedom of Information Act, as amended, waive all or part of any fee provided for in this section which it is deemed to be in either the interest of STR or in the public interest.

§ 2004.11 Current index.

The Office of the STR maintains and makes available for public inspection and copying a current index providing identifying information for the public as to any matter which is issued, adopted, or promulgated after July 4, 1967, and which is retained as a record and is required by § 2004.2 to be made available or published. Publication of an index is deemed both unnecessary and impractical. However, copies of the index are available upon request for a fee of the direct cost of duplication.

§ 2004.12 Annual report to Congress.

(a) On or before March 1st of each calendar year, a report of STR's activities over the preceding calendar year relating to the Freedom of Information Act will be submitted to the Speaker of the House of Representatives and the President of the Senate.

(b) The above report will include:

(1) The number of determinations made by STR not to comply with requests for records made to it under the Act and the reasons for each such determination;

(2) The number of appeals made by persons under the Act, the results of such appeals, and the reasons for the action by STR upon each appeal that results in a denial of information;

(3) The names and titles or positions of each person responsible for the denial of records requested under the Act, and the number of instances of participation for each;

(4) The results of each (Civil Service Commission) proceeding conducted pursuant to the Act, including a report of the disciplinary action taken against the officer or employee who was primarily responsible for improperly withholding records or an explanation of why disciplinary action was not taken;

(5) A copy of every rule made by STR regarding the Act;

(6) A copy of the fee schedule and the total amount of fees collected by STR for making records available under the Act; and

(7) Such other information as indicates efforts by STR to administer fully the Act. (This should include, to the extent possible, data on the costs to STR of administering the Act.)

(c) STR, based in part on the information compiled for its annual report to Congress, will provide upon request assistance to the Department of Justice in the preparation of its annual report (also due each March 1st) to Congress concerning judicial cases arising under the provisions of the Act.

PART 2005—SAFEGUARDING INDIVIDUAL PRIVACY

Sec.
2005.0 Purpose and scope.
2005.1 Rules for determining if an individual is the subject of a record.
2005.2 Requests for access.
2005.3 Access to the accounting of disclosures from records.
2005.4 Requests for copies of records.
2005.5 Requests to amend records.
2005.6 Request for review.
2005.7 Schedule of fees.

AUTHORITY: Pub. L. 93-579, 88 Stat. 1896 (5 U.S.C. 552a(f)).

SOURCE: 40 FR 48331, Oct. 14, 1975, unless otherwise noted.

§ 2005.0 Purpose and scope.

The purpose of these regulations is to provide certain safeguards for an individual against the invasion of his or her personal privacy by the Office of the Special Representative for Trade Negotiations (hereinafter frequently referred to as "STR"). These regulations are promulgated pursuant to the requirements for all Federal Agencies contained in 5 U.S.C. 552a(f).

§ 2005.1 Rules for determining if an individual is the subject of a record.

(a) Individuals desiring to know if a specific system of records maintained by STR contains a record pertaining to them should address their inquiries to the Administrative Officer, Office of the Special Representative for Trade Negotiations, Washington, DC 20506. The written inquiry should contain a specific reference to the system of records maintained by the STR listed in the STR Notice of Systems of Records or it should describe the type of record in sufficient detail to reasonably identify the system of records. Notice of STR systems of records subject to the Privacy Act will be published in the FEDERAL REGISTER and copies of the notices will be available upon request to the Administrative Officer when so published. A compilation of such notices will also be made and published by the Office of Federal Register, in accordance with section 5 U.S.C. 552a(f).

(b) At a minimum, the request should also contain sufficient identifying information to allow STR to determine if there is a record pertaining to the individual making the request in a particular system of records. In instances when the identification is insufficient to insure disclosure to the individual to whom the information pertains in view of the sensitivity of the information, STR reserves the right to solicit from the person requesting access to a record additional identifying information.

(c) Ordinarily the person requesting will be informed whether the named system of records contains a record pertaining to such person within 10 days of such a request (excluding Saturdays, Sundays, and legal Federal holidays). Such a response will also contain or reference the procedures which must be followed by the individual making the request in order to gain access to the record.

(d) Whenever a response cannot be made within the 10 days, the Administrative Officer will inform the person making the request the reasons for the delay and the date of which a response may be anticipated.

§ 2005.2 Requests for access.

(a) *Requirement for written requests.* Individuals desiring to gain access to a record pertaining to them in a system of records maintained by STR must submit their request in writing in accordance with the procedures set forth in paragraph (b) of this section. Individuals who are employed by the STR may make their request on a regularly scheduled workday (Monday through Friday, excluding legal Federal holidays) between the hours of 9 am and 5:30 pm. Such requests for access by individuals employed by STR need not be made in writing.

(b) *Procedures*—(1) *Content of the request.* The request for access to a record in a system of records shall be addressed to the Administrative Officer at the address cited above, and shall name the system of records or contain a description (as concise as possible) of such system of records. The request should state that the request is pursuant to the Privacy Act of 1974. In the absence of such a statement, if the request is for a record pertaining to the person requesting access which is maintained by STR in a system of records, the request will be presumed to be made under the Privacy Act of 1974. The request should contain necessary information to verify the identity of the person requesting access (see paragraph (b)(2)(vi) of this section). In addition, such person should include any other information which may assist in the rapid identification of the record for which access is being requested (e.g. maiden name, dates of employment, etc.) as well as any other identifying information contained in and required by the STR Notice of Systems of Records.

(i) If the request for access follows a prior request under § 2005.1, the same identifying information need not be included in the request for access if a reference is made to that prior correspondence or a copy of the STR response to that request is attached. If the individual specifically desires a copy of the record, the request should so specify under § 2005.4.

(2) *STR action on request.* A request for access will ordinarily be answered within 10 days, except when the Administrative Officer determines otherwise, in which case the person making the request will be informed of the reasons for the delay and an estimated date by which the request will be answered. When the request can be answered within 10 days, it shall include the following:

(i) A statement that there is a record as request or a statement that there is not a record in the systems of records maintained by STR;

(ii) A statement as to whether access will be granted only by providing a copy of the record through the mail; or the address of the location and the date and time at which the record may be examined. In the event the person requesting access is unable to meet the specified date and time, alternative arrangements may be made with the official specified in paragraph (b)(1) of this section.

(iii) A statement, when appropriate, that examination in person will be the sole means of granting access only when the Administrative Officer has determined that it would not unduly impede the right of access of the person making the request.

(iv) The amount of fees charged, if any (see §§ 2005.6 and 2005.7). (Fees are applicable only to requests for copies);

(v) The name, title, and telephone number of the STR official having operational control over the record; and

(vi) The documentation required by STR to verify the identity of the person making the request. At a minimum, STR verification standards include the following:

(A) *Current or former STR Employees.* Current or former STR employees requesting access to a record pertaining to them in a system of records maintained by STR may, in addition to the other requirements of this section, and at the sole discretion of the official having operational control over the record, have his or her identity verified by visual observation. If the current or former STR employee cannot be so identified by the official having operational control over the records, identification documentation will be required. Employee identification cards, annuitant identification, driver licenses, or the "employee copy" of any official personnel document in the record are examples of acceptable identification validation.

(B) *Other than current or former STR employees.* Individuals other than current or former STR employees requesting access to a record pertaining to them in a system of records maintained by STR must produce identification documentation of the type described in paragraph (b)(2)(vi)(A) of this section, prior to being granted access. The extent of the identification documentation required will depend on the type of record for which access is requested. In most cases, identification verification will be accomplished by the presentation of two forms of identification. Any additional requirements will be specified in the system notices published pursuant to 5 U.S.C. 552a(e)(4).

(C) *Access granted by mail.* For records to be made accessible by mail, the Administrative Officer shall, to the extent possible, establish identity by a comparison of signatures in situations where the data in the record is not so sensitive that unauthorized access could cause harm or embarrassment to the individual to whom they pertain. No identification documentation will be required for the disclosure to the person making the request of information required to be made available to the public by 5 U.S.C. 552. When, in the opinion of the Administrative Officer the granting of access through the mail could reasonably be expected to result in harm or embarrassment if disclosed to a person other than the individual to whom the record pertains, a notarized statement of identity or some similar assurance of identity will be required.

(D) *Unavailability of identification documentation.* If an individual is unable to produce adequate identification documentation the individual will be required to sign a statement asserting identity and acknowledging that knowingly or willfully seeking or obtaining access to records about another person under false pretenses may result in a fine of up to $5,000. In addition, depending upon the sensitivity of the records to which access is sought, the official having operational control over the records may require such further reasonable assurances as may be considered appropriate; e.g., statements of other individuals who can attest to the identity of the person making the request.

(E) *Access by the parent of a minor, or by a legal guardian.* A parent of a minor, upon presenting suitable personal identification, may act on behalf of the minor to gain access to any record pertaining to the minor maintained by STR in a system of records. A legal guardian may similarly act on behalf of an individual declared to be incompetent due to physical or mental incapacity or age by a court of competent jurisdiction, upon the presentation of the documents authorizing the legal guardian to so act, and upon suitable personal identification of the guardian.

(F) *Granting access when accompanied by another individual.* When an individual requesting access to his or her record in a system of records maintained by STR wishes to be accompanied by another individual during the course of the examination of the record, the individual making the request shall submit to the official having operational control of the record, a signed statement authorizing that person access to the record.

(G) *Denial of access for inadequate identification documentation.* If the official having operation control over the records in a system of records maintained by STR determines that an individual seeking access has not provided sufficient identification documentation to permit access, the official shall consult with the Administrative officer prior to finally denying the individual access.

(vii) *Medical records.* The records in a system of records which are medical records shall be disclosed to the individual to whom they pertain in such manner and following such procedures as the Administrative Officer shall direct. When STR in consultation with a physician, determines that the disclosure of medical information could have an adverse effect upon the individual to whom it pertains, STR may transmit such information to a physician named by the individual.

(viii) *Exceptions.* Nothing in this section shall be construed to entitle an individual the right to access to any information compiled in reasonable anticipation of a civil action or proceedings.

§ 2005.3 Access to the accounting of disclosures from records.

Rules governing the granting of access to the accounting of disclosures are the same as those for granting access to the records (including verification of identity) outlined in § 2005.2.

§ 2005.4 Requests for copies of records.

Rules governing requests for copies of records are the same as those for the granting of access to the records (including verification of identity) outlined in § 2005.2. (See also § 2005.7 for rules regarding fees.)

§ 2005.5 Requests to amend records.

(a) *Requirement for written requests.* Individuals desiring to amend a record that pertains to them in a system of records maintained by STR must submit their request in writing in accordance with the procedures set forth herein unless this requirement is waived by the official having responsibility for the system of records. Records not subject to the Privacy Act of 1974 will not be amended in accordance with these provisions. However, individuals who believe that such records are inaccurate may bring this to the attention of STR.

(b) *Procedures.* (1) (i) The request to amend a record in a system of records shall be addressed to the Administrative Officer. Included in the request shall be the name of the system and a brief description of the record proposed for amendment. In the event the request to amend the record is the result of the individual's having gained access to the record in accordance with the provisions concerning access to records as set forth above, copies of previous correspondence between the individual and STR will serve in lieu of a separate description of the record.

(ii) When the individual's identity has been previously verified pursuant to § 2005.2(b)(2)(vi) herein, further verification of identity is not required as long as the communication does not suggest that a need for verification has reappeared. If the individual's identity has not been previously verified, STR may require identification validation as described in § 2005.2(b)(2)(vi). Individuals desiring assistance in the preparation of a request to amend a record should contact the Administrative Officer at the address cited above.

(iii) The exact portion of the record the individual seeks to have amended should be clearly indicated. If possible, the proposed alternative language should also be set forth, or at a minimum, the facts which the individual believes are not accurate, relevant, timely, or complete should be set forth with such particularity as to permit STR not only to understand the individual's basis for the request, but also to make an appropriate amendment to the record.

(iv) The request must also set forth the reasons why the individual believes his record is not accurate, relevant, timely, or complete. In order to avoid the retention by STR of personal information merely to permit verification of records, the burden of persuading STR to amend a record will be upon the individual. The individual must furnish sufficient facts to persuade the official in charge of the system of the inaccuracy, irrelevancy, untimeliness, or incompleteness of the record.

(2) *STR action on the request.* To the extent possible, a decision upon a request to amend a record will be made within 10 days, excluding Saturdays, Sundays, and legal Federal holidays. In the event a decision cannot be made within this time frame, the individual making the request will be informed within 10 days of the expected date for a decision. The decision upon a request for amendment will include the following:

(i) The decision of the STR whether to grant in whole, or deny any part of the request to amend the record.

(ii) The reasons for the determination for any portion of the request which is denied.

(iii) The name and address of the official with whom an appeal of the denial may be lodged.

(iv) The name and address of the official designated to assist, as necessary, and upon request of, the individual making the request in the preparation of the appeal.

(v) A description of the review of the appeal within STR (see § 2005.6).

(vi) A description of any other procedures which may be required of the individual in order to process the appeal.

§ 2005.6 Request for review.

(a) Individuals wishing to request a review of the decision by STR with regard to an initial request to amend a record in accordance with the provisions of § 2005.5, should submit the request for review in writing and, to the extent possible, include the information specified in § 2005.5(a). Individuals desiring assistance in the preparation of their request for review should contact the Administrative Officer at the address provided herein.

(b) The request for review should contain a brief description of the record involved or in lieu thereof, copies of the correspondence from STR in which the request to amend was denied and also the reasons why the individual believes that the disputed information should be amended. The request for review should make reference to the information furnished by the individual in support of his claim and the reasons, as required by § 2005.5, set forth by STR in its decision denying the amendment. Appeals filed without a complete statement by the person making the request setting forth the reasons for the review will, of course, be processed. However, in order to make the appellate process as meaningful as possible, such person's disagreement should be understandably set forth. In order to avoid the unnecessary retention of personal information, STR reserves the right to dispose of the material concerning the request to amend a record if no request for review in accordance with this section is received by STR within 180 days of the mailing by STR of its decision upon an initial request. A request for review received after the 180 day period may, at the discretion of the Administrative Officer, be treated as an initial request to amend a record.

(c) The request for review should be addressed to the Freedom of Information Appeals Committee (established in 15 CFR 2004.7) Office of the Special Representative for Trade Negotiations, Room 719, 1800 G St. NW., Washington, DC 20506.

(d) Final determinations on requests for reviews within STR will be made by the Freedom of Information Appeals Committee, chaired by the Special Representative for Trade Negotiations. Additional information may be requested by the Committee from the person requesting a review if necessary to make a determination.

(e) The FOI Appeals Committee will inform the person making the request in writing of the decision on the request for review within 30 days (excluding Saturdays, Sundays, and legal Federal holidays) from the date of receipt by STR of the individual's request for review, unless the Committee extends the 30 day period for good cause. The extension and the reasons therefor will be sent by STR to the individual within the initial 30 day period. Included in the notice of a decision being reviewed, if the decision does not grant in full the request for review, will be a description of the steps the individual may take to obtain judicial review of such a decision, and a statement that the individual may file a concise statement with STR setting forth the individual's reasons for his disagreement with the decision upon the request for review. The STR Administrative Officer has the authority to determine the "conciseness" of the statement, taking into account the scope of the disagreement and the complexity of the issues. Upon the filing of a proper concise statement by the individual, any subsequent disclosure of the information in dispute will have the information in dispute clearly noted and a copy of the concise statement furnished, setting forth its reasons for not making the requested changes, if STR chooses to file such a statement. A copy of the individual's statement, and if it chooses, STR's statement, will be sent to any prior transferee of the disputed information who is listed on the accounting required by 5 U.S.C. 552a(c).

§ 2005.7 Schedule of fees.

(a) *Prohibitions against charging fees.* Individuals will not be charged for:

(1) The search and review of the record;

(2) Any copies of the record produced as a necessary part of the process of making the record available for access; or

(3) Any copies of the requested record when it has been determined that access can only be accomplished by providing a copy of the record through the mail.

(b) *Waiver.* The Administrative Officer may, at no charge, provide copies of a record if it is determined the production of the copies is in the interest of the Government.

(c) *Fee schedule and method of payment.* Fees will be charged as provided below except as provided in paragraphs (a) and (b) of this section.

(1) Duplication of records. Records will be duplicated at a rate of $.10 per page for all copying of 4 pages or more. There is no charge for duplicating 3 or fewer pages.

(2) Where it is anticipated that the fees chargeable under this section will amount to more than $25, the person making the request shall be promptly notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. In instances where the estimated fees will greatly exceed $25, an advance deposit may be required. The notice or request for an advance deposit shall extend an offer to the person requesting to consult with the Administrative Officer in order to reformulate the request in a manner which will reduce the fees, yet still meet the needs of individuals making the request.

(3) Fees must be paid in full prior to issuance of requested copies. In the event the person requesting is in arrears for previous requests copies will not be provided for any subsequent request until the arrears have been paid in full.

(4) Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to the order of the Treasury of the United States and mailed or delivered to the Administrative Officer, Office of the Special Representative for Trade Negotiations, 1800 G St., NW., Washington, DC, 20506.

(5) A receipt for fees paid will be given upon request.

PART 2006—PROCEDURES FOR FILING PETITIONS FOR ACTION UNDER SECTION 301 OF THE TRADE ACT OF 1974, AS AMENDED

Sec.

2006.0 Submission of petitions requesting action under section 301.
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AUTHORITY: Sec. 309(a)(1), Trade Act of 1974, as amended by sec. 1301 of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1176 (19 U.S.C. 2419).

SOURCE: 55 FR 20595, May 18, 1990, unless otherwise noted.

§ 2006.0 Submission of petitions requesting action under section 301.

(a) Section 301 of the Trade Act of 1974, as amended (the "Trade Act") requires the United States Trade Representative, subject to the specific direction, if any, of the President regarding such action, to take appropri-

e and feasible action in response to a
reign government's violation of a
ade agreement, or any other interna-
onal agreement the breach of which
rdens or restricts United States
mmerce; and authorizes the Trade
epresentative, subject to the specific
rection of the President, if any, to
ke action to obtain the elimination
acts, policies, and practices of for-
gn countries that are unjustifiable,
reasonable, or discriminatory and
rden or restrict United States com-
erce. Section 302 of the Trade Act
ovides for petitions to be filed with
e Trade Representative requesting
at action be taken under section 301.
etitions filed under section 302 will
e treated as specified in these regula-
ons.

(b) Petitions may be submitted by an
terested person. An interested
erson is deemed to be any party who
s a significant interest affected by
e act, policy, or practice complained
, for example: A producer, a com-
ercial importer, or an exporter of an
fected product or service; a United
ates person seeking to invest direct-
abroad, with implications for trade
goods or services; a person who
lies on protection of intellectual
operty rights; a trade association, a
rtified union or recognized union or
oup of workers which is representa-
ve of an industry engaged in the
anufacture, production or wholesale
stribution in the United States of a
oduct or service so affected; or any
her private party representing a sig-
ficant economic interest affected di-
ctly by the act, policy or practice
mplained of in the petition.

(c) The petitioner shall submit 20
pies of the petition in English, clear-
typed, photocopied, or printed to:
hairman, Section 301 Committee,
ffice of the United States Trade
epresentative, 600 17th Street, NW.,
ashington, DC 20506.

To ensure proper docketing, peti-
ons may be filed only during the fol-
wing hours on days when the Feder-
Government is open for business:
etween 9 a.m. and 12 noon and 1 p.m.
5 p.m.

(d) Recorded information on section
2 petitions and investigations may
e obtained by calling (202) 395-3871.

§ 2006.1 Information to be included in petition.

(a) *General information.* Petitions submitted pursuant to section 302 of the Trade Act shall clearly state on the first page that the petition requests that action be taken under section 301 of the Trade Act and shall contain allegations and information reasonably available to petitioner in support of the request, in the form specified below. Petitioners for whom such information is difficult or impossible to obtain shall provide as much information as possible, and assistance in filing their petition may be obtained through the Chairman of the Section 301 Committee. All petitions shall:

(1) Identify the petitioner and the person, firm or association, if any, which petitioner represents and describe briefly the economic interest of the petitioner which is directly affected by the failure of a foreign government or instrumentality to grant rights of the United States under a trade agreement, or which is otherwise directly affected economically by an act, policy, or practice which is actionable under section 301.

(2) Describe the rights of the United States being violated or denied under the trade agreement which petitioner seeks to enforce or the other act, policy or practice which is the subject of the petition, and provide a reference to the particular part of section 301 related to the assertion in the petition.

(3) Include, wherever possible, copies of laws or regulations which are the subject of the petition. If this is not possible, the laws and regulations shall be identified with the greatest possible particularity, such as by citation.

(4) Identify the foreign country or instrumentality with whom the United States has an agreement under which petitioner is asserting rights claimed to be denied or whose acts, policies or practices are the subject of the petition.

(5) Identify the product, service, intellectual property right, or foreign direct investment matter for which the rights of the United States under the agreement claimed to be violated

or denied are sought, or which is subject to the act, policy or practice of the foreign government or instrumentality named in paragraph (a)(4) of this section.

(6) Demonstrate that rights of the United States under a trade agreement are not being provided; or show the manner in which the act, policy or practice violates or is inconsistent with the provisions of a trade agreement or otherwise denies benefits accruing to the United States under a trade agreement, or is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce.

(7) Provide information concerning

(i) The degree to which U.S. commerce is burdened or restricted by the denial of rights under a trade agreement or by any other act, policy, or practice which is actionable under section 301,

(ii) The volume of trade in the goods or services involved, and

(iii) A description of the methodology used to calculate the burden or restriction on U.S. commerce.

(8) State whether petitioner has filed or is filing for other forms of relief under the Trade Act or any other provision of law. If the foreign government practice at issue is the subject of investigation under any other provision of law, the USTR may determine not to initiate an investigation; or if the same matter is subsequently subject to investigation under some other provision of law, USTR may terminate the section 302 investigation.

(b) *Additional specific information*—(*1*) *Subsidies.* If the petition includes an assertion that subsidy payments are having an adverse effect upon products or services of the United States in United States' markets or in other foreign markets, it shall include an analysis supporting any claim that the subsidy complained of is inconsistent with any trade agreement and describe the manner in which it burdens or restricts United States commerce.

(2) *Certain unreasonable practices.* If the petition asserts that an unreasonable practice defined in section 301(d) (3) denies fair and equitable opportunities for the establishment of an enterprise, or denies adequate and effective protection of intellectual property rights, or denies fair and equitable market opportunities, and burdens or restricts U.S. commerce, the petition should include, to the extent possible, identification of reciprocal opportunities in the United States that may exist for foreign nationals and firms; and

(i) If the petition asserts that fair and equitable opportunities for the establishment of an enterprise in a foreign country are denied, the petition shall

(A) Describe in detail the nature of any foreign direct investment proposed by the United States person, including estimates of trade in goods and services that could reasonably be expected to result from that investment,

(B) Indicate the manner in which the foreign government is denying the United States person a fair and equitable opportunity for the establishment of an enterprise,

(C) State whether action by the foreign government is in violation of or inconsistent with the international legal rights of the United States, citing the relevant provisions of any international agreements to which the United States and the foreign government are party, and

(D) To the extent possible, provide copies of all relevant foreign government statutes, regulations, directives, public policy statements and correspondence with the United States person with respect to the proposed investment.

(ii) If the petition asserts that fair and equitable provision of adequate and effective protection of intellectual property rights in a foreign country is denied, the petition shall

(A) Identify the intellectual property right for which protection has been sought,

(B) Indicate how persons who are not citizens or nationals of such foreign country are denied the opportunity to secure, exercise, and enforce rights relating to patents, process patents, registered trademarks, copyrights, or mask works, and

(C) Provide information on the relevant laws of the foreign country and an analysis of how the foreign country's law or policies conform to provisions of international law or international agreements to which both the United States and the foreign country are parties;

(iii) If the petition asserts that fair and equitable market opportunities are denied through the toleration by a foreign government of systematic private anticompetitive activities, the petition shall specifically

(A) Identify the private firms in the foreign country whose systematic anticompetitive activities have the effect of restricting access of United States goods to purchasing by those firms, inconsistent with commercial considerations,

(B) Describe in detail the private activities in question,

(C) State whether evidence of such activities has been provided (by petitioner or others) to the appropriate foreign government authorities, and describe the evidence indicating that the foreign government is aware of and supports, encourages, or tolerates such activities,

(D) Describe the duration and pervasiveness of such activities,

(E) Indicate whether such activities are inconsistent with the laws of the foreign country involved, making specific reference to any laws in question, and

(F) Indicate whether the foreign government's enforcement of (or failure to enforce) its relevant laws with respect to the private activities at issue is inconsistent with its enforcement practices in other situations;

(iv) If the petition asserts that an act, policy or practice, or combination thereof constitutes export targeting, the petition shall

(A) Identify the specific enterprise, industry, or group thereof which has been assisted in becoming more competitive in the export of the affected product or products,

(B) Describe the elements of the foreign government's plan or scheme consisting of coordinated actions to assist that enterprise, industry, or group, and

(C) Provide information on how and to what degree exports of the affected products by that enterprise, industry, or group have become more competitive as a result of the foreign government's plan or scheme; and

(v) If the petition asserts that an act, policy or practice, or combination thereof constitutes a persistent pattern of conduct that denies workers the right of association or the right to organize and bargain collectively, or permits forced or compulsory labor, or fails to provide a minimum age for employment of children or standards for minimum wages, hours, and occupational safety and health of workers, the petition shall

(A) Describe the rights or standards denied and provide information on the laws, policies and practices of the foreign country involved, if any, that relate to such rights or standards, and

(B) Indicate, to the extent such information is available to petitioner, whether the foreign country has taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing these rights or standards.

§ 2006.2 Adequacy of the petition.

If the petition filed pursuant to section 302 does not conform substantially to the requirements of §§ 2006.0 and 2006.1, the Chairman of the Section 301 Committee may decline to docket the petition as filed and, if requested by petitioner, return it to petitioner with guidance on making the petition conform to the requirements, or may nevertheless determine that there is sufficient information on which to proceed to a determination whether to initiate an investigation.

§ 2006.3 Determinations regarding petitions.

Within 45 days after the day on which the petition is received, the Trade Representative shall determine, after receiving the advice of the Section 301 Committee, whether to initiate an investigation.

(a) If the Trade Representative determines not to initiate an investigation, the Section 301 Chairman shall notify the petitioner of the reasons and shall publish notice of the negative determination and a summary of the reasons therefor in the FEDERAL REGISTER.

(b) If the Trade Representative determines to initiate an investigation regarding the petition, the Section 301 Chairman shall publish a summary of the petition in the FEDERAL REGISTER, and provide an opportunity for the presentation of views concerning the issues, including a public hearing if requested. A hearing may be requested by the petitioner or any interested person, including but not limited to a domestic firm or worker, a representative of consumer interests, a United States product exporter, or any industrial user of any goods or services that may be affected by actions taken under section 301 with respect to the act, policy or practice that is the subject of the petition.

§ 2006.4 Requests for information made to Foreign Governments or Instrumentalities.

If the U.S. Trade Representative receives a petition alleging violations of any international agreement, he will notify the foreign government or instrumentality of the allegations and may request information, in English, necessary to a determination under section 304(a)(1)(A) of the Trade Act. The Trade Representative may proceed on the basis of best information available if, within a reasonable time, no information is received in response to the request.

§ 2006.5 Consultations with the Foreign Government.

(a) If the Trade Representative determines to initiate an investigation on the basis of a petition he shall, on behalf of the United States, request consultations with the foreign country concerned regarding the issues involved in such an investigation. In preparing United States presentations for consultations and dispute settlement proceedings, the Trade Representative shall seek information and advice from the petitioner and any appropriate private sector representatives, including committees established pursuant to section 135 of the Trade Act.

(b) To ensure an adequate basis for consultation, the Trade Representative may, after consulting with the petitioner, delay requests for consultations for up to 90 days in order to verify or improve the petition. If consultations are delayed, the time limits referred to in § 2006.12 below shall be extended for the period of such delay.

§ 2006.6 Formal dispute settlement.

If the issues in a petition are covered by a trade agreement between the United States and the foreign government involved and a mutually acceptable resolution cannot be reached within the consultation period provided for in the agreement, or by 150 days after consultations begin, whichever is earlier, the Trade Representative shall institute the formal dispute settlement proceedings, if any, provided for in the trade agreement.

§ 2006.7 Public hearings.

(a) A public hearing for the purpose of receiving views on the issues raised in a petition shall be held by the Section 301 Committee:

(1) Within 30 days after the date that an investigation is initiated under section 302(a)(2) if a hearing is requested in the petition (or later, if agreed to by the petitioner); or

(2) Within a reasonable period if, after the investigation is initiated, a timely request is made by the petitioner, or any other interested person as defined in § 2006.3(b).

(b) Prior to making a recommendation on what action, if any, should be taken in response to issues raised in the petition, the Section 301 Committee shall hold a public hearing upon the written request of any interested person. An interested person should submit an application to the Section 301 Chairman stating briefly the interest of the person requesting the hearing, the firm, person, or association he represents, and the position to be taken. A hearing so requested shall be held:

(1) Prior to determining what action should be taken under section 301, and after at least 30 days' notice; or

(2) Within 30 days after the determination of action is made, if the Trade Representative determines that expeditious action is required.

(c) After receipt of a request for a public hearing under sections 302(a)(4)(B) or 304(b)(1)(A) of the Trade Act, the Chairman of the Section 301 Committee will notify the applicant whether the request meets the requirements of this part, and if not, the reasons therefor. If the applicant has met the requirements of this part, he will receive at least 30 days' notice of the time and place of the hearing.

(d) Notice of public hearings to be held under sections 302(a)(4)(B) and 304(b)(1)(A) shall be published in the FEDERAL REGISTER by the Chairman of the Section 301 Committee.

§ 2006.8 Submission of written briefs.

(a) In order to participate in the presentation of views either at a public hearing or otherwise, an interested person must submit a written brief before the close of the period of submission announced in the public notice. The brief may be, but need not be, supplemented by the presentation of oral testimony in any public hearing scheduled in accordance with § 2006.7.

(b) The brief shall state clearly the position taken and shall describe with particularity the supporting rationale. It shall be submitted in 20 copies, which must be legibly typed, printed, or duplicated.

(c) In order to assure each interested person an opportunity to contest the information provided by other parties, the Section 301 Committee will entertain rebuttal briefs filed by any interested person within a time limit specified in the public notice. Rebuttal briefs should be strictly limited to demonstrating errors of fact or analysis not pointed out in the briefs or hearing and should be as concise as possible.

§ 2006.9 Presentation of oral testimony at public hearings.

(a) A request by an interested person to present oral testimony at a public hearing shall be submitted in writing before the close of the period of submission announced in the public notice and shall state briefly the interest of the applicant. Such request will be granted if a brief has been submitted in accordance with § 2006.8.

(b) After consideration of a request to present oral testimony at a public hearing, the Chairman of the Section 301 Committee will notify the applicant whether the request conforms to the requirements of § 2006.8(a) and, if it does not, will give the reasons. If the applicant has submitted a conforming request he shall be notified of the time and place for the hearing and for his oral testimony.

§ 2006.10 Waiver of requirements.

To the extent consistent with the requirements of the Trade Act, the requirements of §§ 2006.0 through 2006.3 and 2006.8 may be waived by the Trade Representative or the Chairman of the Section 301 Committee upon a showing of good cause and for reasons of equity and the public interest.

§ 2006.11 Consultations before making determinations.

Prior to making a determination on what action, if any, should be taken in regard to issues raised in the petition, the Trade Representative shall obtain advice from any appropriate private sector advisory representatives, including committees established pursuant to section 135 of the Trade Act, unless expeditious action is required, in which case he shall seek such advice after making the determination. The Trade Representative may also request the views of the International Trade Commission regarding the probable economic impact of the proposed action.

§ 2006.12 Determinations; Time limits.

On the basis of the petition, investigation and consultations, and after receiving the advice of the Section 301 Committee, the Trade Representative shall determine whether U.S. rights under any trade agreement are being denied, or whether any other act, policy, or practice actionable under section 301 exists and, if so, what action (if any) should be taken under section 301. These determinations shall be made:

(a) In the case of an investigation involving a trade agreement (other than the agreement on subsidies and countervailing measures described in section 2(c)(5) of the Trade Agreements Act of 1979), within 30 days after the dispute settlement procedure concludes, or 18 months after the initiation of the investigation, whichever is earlier.

(b) In all other cases, within 12 months after initiating an investigation.

§ 2006.13 Information open to public inspection.

(a) With the exception of information subject to § 2006.15, an interested person may, upon advance request, inspect at a public reading room in the Office of the United States Trade Representative:

(1) Any written petition, brief, or similar submission of information (other than that to which confidentiality applies) made in the course of a section 302 proceeding;

(2) Any stenographic record of a public hearing held pursuant to section 302 or 304.

(b) In addition, upon written request submitted in accordance with section 308 of the Trade Act, any person may obtain from the Section 301 Chairman the following, to the extent that such information is available to the Office of the U.S. Trade Representative or other Federal agencies:

(1) Information on the nature and extent of a specific trade policy or practice of a foreign government or instrumentality with respect to particular goods, services, investment, or intellectual property rights;

(2) Information on United States rights under any trade agreement and the remedies which may be available under that agreement and under the laws of the United States; and

(3) Information on past and present domestic and international proceedings or actions with respect to the policy or practice concerned.

(c) An appropriate fee will be charged for duplication of documents requested under § 2006.13.

§ 2006.14 Information not available.

If the Office of the U.S. Trade Representative does not have, and cannot obtain from other Federal agencies, information requested in writing by any person, the Section 301 Chairman shall, within 30 days after the receipt of the request:

(a) Request the information from the foreign government involved; or

(b) Decline to request the information and inform the person in writing of the reasons for the refusal.

§ 2006.15 Information exempt from public inspection.

(a) The Chairman of the Section 301 Committee shall exempt from public inspection business information submitted in confidence if he determines that such information involves trade secrets or commercial and financial information the disclosure of which is not authorized by the person furnishing such information nor required by law.

(b) An interested person requesting that the Chairman exempt from public inspection confidential business information submitted in writing must certify in writing that such information is business confidential, the disclosure of such information would endanger trade secrets or profitability, and such information is not generally available. The information submitted must be clearly marked "BUSINESS CONFIDENTIAL" in a contrasting color ink at the top of each page on each copy, and shall be accompanied by a nonconfidential summary of the confidential information.

(c) The Section 301 Chairman may use such information, or make such information available (in his own discretion) to any employee of the Federal Government for use in any investigation under section 302, or make such information available to any other person in a form which cannot be associated with, or otherwise identify, the person providing the information.

(d) The Section 301 Chairman may deny a request that he exempt from public inspection any particular business information if he determines that such information is not entitled to exemption under law. In the event of a denial, the interested person submitting the particular business information will be notified of the reasons for the denial and will be permitted to withdraw the submission.

PART 2007—REGULATIONS OF THE U.S. TRADE REPRESENTATIVE PERTAINING TO ELIGIBILITY OF ARTICLES AND COUNTRIES FOR THE GENERALIZED SYSTEM OF PREFERENCE PROGRAM (GSP (15 CFR PART 2007))

Sec.

2007.0 Requests for reviews.
2007.1 Information required of interested parties in submitting requests for modifications in the list of eligible articles.
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2007.5 Written briefs and oral testimony.
2007.6 Information open to public inspection.
2007.7 Information exempt from public inspection.
2007.8 Other reviews of article eligibilities.

Authority: 19 U.S.C. 2461-65, 88 Stat. 2066-2071, as amended by Title V of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 3018-3024; E.O. 11846 of March 27, 1975 (40 FR 14291), E.O. 12188 of January 2, 1980 (45 FR 989).

Source: 51 FR 5037, Feb. 11, 1986, unless otherwise noted.

§ 2007.0 Requests for reviews.

(a) An interested party may submit a request (1) that additional articles be designated as eligible for GSP duty-free treatment, provided that the article has not been accepted for review within the three preceding calendar years; or (2) that the duty-free treatment accorded to eligible articles under the GSP be withdrawn, suspended or limited; or (3) for a determination of whether a like or directly competitive product was produced in the United States on January 3, 1985 for the purposes of section 504(d)(1) (19 U.S. 2464(d)(1)); or (4) that the President exercise his waiver authority with respect to a specific article or articles pursuant to section 504(c)(3) (19 U.S.C. 2464(c)(3)); or (5) that product coverage be otherwise modified.

(b) During the annual reviews and general reviews conducted pursuant to the schedule set out in § 2007.3 any person may file a request to have the GSP status of any eligible beneficiary developing country reviewed with respect to any of the designation criteria listed in section 502(b) or 502(c) (19 U.S.C. 2642 (b) and (c)). Such requests must (1) specify the name of the person or the group requesting the review; (2) identify the beneficiary country that would be subject to the review; (3) indicate the specific section 502(b) or 502(c) criteria which the requestor believes warrants review; (4) provide a statement of reasons why the beneficiary country's status should be reviewed along with all available supporting information; (5) supply any other relevant information as requested by the GSP Subcommittee. If the subject matter of the request has been reviewed pursuant to a previous request, the request must include substantial new information warranting further consideration of the issue.

(c) An interested party or any other person may make submissions supporting, opposing or otherwise commenting on a request submitted pursuant to either paragraph (a) or (b) of this section.

(d) For the purposes of the regulations set out under § 2007.0 et seq., an interested party is defined as a party who has significant economic interest in the subject matter of the request, or any other party representing a significant economic interest that would be materially affected by the action requested, such as a domestic producer of a like or directly competitive article, a commercial importer or retailer of an article which is eligible for the GSP or for which such eligibility is requested, or a foreign government.

(e) All requests and other submissions should be submitted in 20 copies, and should be addressed to the Chairman, GSP Subcommittee, Trade Policy Staff Committee, Office of the United States Trade Representative, 600 17th Street, NW., Washington, D.C. 20506. Requests by foreign governments may be made in the form of diplomatic correspondence provided that such requests comply with the requirements of § 2007.1.

(f) The Trade Policy Staff Committee (TPSC) may at any time, on its own motion, initiate any of the actions described in paragraph (a) or (b) of this section.

§ 2007.1 Information required of interested parties in submitting requests for modifications in the last of eligible articles.

(a) *General Information Required.* A request submitted pursuant to this part, hereinafter also referred to as a petition, except requests submitted pursuant to § 2007.0(b), shall state clearly on the first page that it is a request for action with respect to the provision of duty-free treatment for an article or articles under the GSP, and must contain all information listed in this paragraph and in paragraphs (b) and (c). Petitions which do not contain the information required by this paragraph shall not be accepted for review except upon a showing that the petitioner made a good faith effort to obtain the information required. Petitions shall contain, in addition to any other information specifically requested, the following information:

(1) The name of the petitioner, the person, firm or association represented by the petitioner, and a brief description of the interest of the petitioner claiming to be affected by the operation of the GSP;

(2) An identification of the product or products of interest to the petitioner, including a detailed description of products and their uses and the identification of the pertinent item number of the Tariff Schedules of the United States (TSUS). Where the product or products of interest are included with other products in a basket category of the TSUS, provide a detailed description of the product or products of interest;

(3) A description of the action requested, together with a statement of the reasons therefor and any supporting information;

(4) A statement of whether to the best of the Petitioner's knowledge, the reasoning and information has been presented to the TPSC previously either by the petitioner or another party. If the Petitioner has knowledge the request has been made previously, it must include either new information which indicates changed circumstances or a rebuttal of the factors supporting the denial of the previous request. If it is a request for a product addition, the previous request must not have been formally accepted for review within the preceding three calendar year period; and

(5) A statement of the benefits anticipated by the petitioner if the request is granted, along with supporting facts or arguments.

(b) *Requests to withdraw, limit or suspend eligibility with respect to designated articles.* Petitions requesting withdrawal or limitation of duty-free treatment accorded under GSP to an eligible article or articles must include the following information with respect to the relevant United States industry for the most recent three year period:

(1) The names, number and locations of the firms producing a like or directly competitive product;

(2) Actual production figures;

(3) Production capacity and capacity utilization;

(4) Employment figures, including number, type, wage rate, location, and changes in any of these elements;

(5) Sales figures in terms of quantity, value and price;

(6) Quantity and value of exports, as well as principal export markets;

(7) Profitability of firm on firms producing the like product, if possible show profit data by product line;

(8) Analysis of cost including materials, labor and overhead;

(9) A discussion of the competitive situation of the domestic industry;

(10) Identification of competitors; analysis of the effect imports receiving duty-free treatment under the GSP have on competition and the business of the interest on whose behalf the request is made;

(11) Any relevant information relating to the factors listed in section 501 and 502(c) of Title V of the Trade Act of 1974, as amended (19 U.S.C. 2501, 502(c)) such as identification of tariff and non-tariff barriers to sales in foreign markets;

(12) Any other relevant information including any additional information that may be requested by the GSP Subcommittee.

This information should be submitted with the request for each article that is the subject of the request, both for the party making the request, and to the extent possible, for the industry to which the request pertains.

(c) *Requests to designate new articles.* Information to be provided in petitions requesting the designation of new articles submitted by interested parties must include for the most recent three year period the following information for the beneficiary country on whose behalf the request is being made and, to the extent possible, other principal beneficiary country suppliers:

(1) Identification of the principal beneficiary country suppliers expected to benefit from proposed modification;

(2) Name and location of firms;

(3) Actual production figures (and estimated increase in GSP status is granted);

(4) Actual production and capacity utilization (and estimated increase if GSP status is granted);

(5) Employment figures, including numbers, type, wage rate, location and changes in any of these elements if GSP treatment is granted;

(6) Sales figures in terms of quantity, value and prices;

(7) Information on total exports including principal markets, the distribution of products, existing tariff preferences in such markets, total quantity, value and trends in exports;

(8) Information on exports to the United States in terms of quantity, value and price, as well as considerations which affect the competitiveness of these exports relative to exports to the United States by other beneficiary countries of a like or directly competitive product. Where possible, petitioners should provide information on the development of the industry in beneficiary countries and trends in their production and promotional activities;

(9) Analysis of cost including materials, labor and overhead;

(10) Profitability of firms producing the product;

(11) Information on unit prices and a statement of other considerations such as variations in quality or use that affect price competition;

(12) If the petition is submitted by a foreign government or a government controlled entity, it should include a statement of the manner in which the requested action would further the economic development of the country submitting the petition;

(13) If appropriate, an assessment of how the article would qualify under the GSP's 35 percent value-added requirements; and

(14) Any other relevant information, including any information that may be requested by the GSP Subcommittee.

Submissions made by persons in support of or opposition to a request made under this part should conform to the requirements for requests contained in § 2007.1(a) (3) and (4), and should supply such other relevant information as is available.

§ 2007.2 Action following receipt of requests for modifications in the list of eligible articles and for reviews of the GSP status of eligible beneficiary countries with respect to designation criteria.

(a)(1) If a request submitted pursuant to § 2007.0(a) does not conform to the requirements set forth above, or if it is clear from available information that the request does not warrant further consideration, the request shall not be accepted for review. Upon written request, requests which are not accepted for review will be returned together with a written statement of the reasons why the request was not accepted.

(2) If a request submitted pursuant to § 2007.0(b) does not conform to the requirements set forth above, or if the request does not provide sufficient information relevant to subsection 502(b) or 502(c) (19 U.S.C. 2642 (b) and (c)) to warrant review, or if it is clear from available information that the request does not fall within the criteria of subsection 502(b) or 502(c), the request shall not be accepted for review. Upon written request, requests which are not accepted for review will be returned together with a written statement of the reasons why the request was not accepted.

(b) Requests which conform to the requirements set forth above or for which petitioners have demonstrated a good faith effort to obtain information in order to meet the requirements set forth above, and for which further consideration is deemed warranted, shall be accepted for review.

(c) The TPSC shall announce in the FEDERAL REGISTER those requests which will be considered for full examination in the annual review and the deadlines for submissions made pursuant to the review, including the deadlines for submission of comments on the U.S. International Trade Commission (USITC) report in instances in which USITC advice is requested.

(d) In conducting annual reviews, the TPSC shall hold public hearings in order to provide the opportunity for public testimony on petitions and requests filed pursuant to paragraphs (a) and (b) of § 2007.0.

(e) As appropriate, the USTR on behalf of the President will request advice from the USITC.

(f) The GSP Subcommittee of the TPSC shall conduct the first level of interagency consideration under this part, and shall submit the results of its review to the TPSC.

(g) The TPSC shall review the work of the GSP Subcommittee and shall conduct, as necessary, further reviews of requests submitted and accepted under this part. Unless subject to additional review, the TPSC shall prepare recommendations for the President on any modifications to the GSP under this part. The Chairman of the TPSC shall report the results of the TPSC's review to the U.S. Trade Representative who may convene the Trade Policy Review Group (TPRG) or the Trade Policy Committee (TPC) for further review of recommendations and other decisions as necessary. The U.S. Trade Representative, after receiving the advice of the TPSC, TPRG or TPC, shall make recommendations to the President on any modifications to the GSP under this part, including recommendations that no modifications be made.

(h) In considering whether to recommend: (1) That additional articles be designated as eligible for the GSP; (2) that the duty-free treatment accorded to eligible articles under the GSP be withdrawn, suspended or limited; (3) that product coverage be otherwise modified; or (4) that changes be made with respect to the GSP status of eligible beneficiary countries, the GSP Subcommittee on behalf of the TPSC, TPRG, or TPC shall review the relevant information submitted in connection with or concerning a request under this part together with any other information which may be available relevant to the statutory prerequisites for Presidential action contained in Title V of the Trade Act of 1974, as amended (19 U.S.C. 2461-2465).

§ 2007.3 Timetable for reviews.

(a) *Annual review.* Beginning in calendar year 1986, reviews of pending requests shall be conducted at least once each year, according to the following schedule, unless otherwise specified by FEDERAL REGISTER notice:

(1) June 1, deadline for acceptance of petitions for review;

(2) July 15, FEDERAL REGISTER announcement of petitions accepted for review;

(3) September/October—public hearings and submission of written briefs and rebuttal materials;

(4) December/January—opportunity for public comment on USITC public reports;

(5) Results announced on April 1 will be implemented on July 1, the statutory effective date of modifications to the program. If the date specified is on or immediately follows a weekend or holiday, the effective date will be on the second working day following such weekend or holiday.

(b) Requests filed pursuant to paragraph (a) or (b) of § 2007.0 which indicate the existence of unusual circumstances warranting an immediate review may be considered separately. Requests for such urgent consideration should contain a statement of reasons indicating why an expedited review is warranted.

(c) *General Review.* Section 504(c)(2) of Title V of the Trade Act of 1974 (19 U.S.C. 2464(c)(2)) requires that, not later than January 4, 1987 and periodically thereafter, the President conduct a general review of eligible articles based on the considerations in sections 501 and 502(c) of Title V. The initiation and scheduling of such reviews as well as the timetable for submission of comments and statements will be announced in the FEDERAL REGISTER. The first general review was initiated on February 14, 1985 and will be completed by January 3, 1987.

The initiation of the review and deadlines for submission of comments and statements were announced in the FEDERAL REGISTER on February 14, 1985 (50 FR 6294).

§ 2007.4 Publication regarding requests.

(a) Whenever a request is received which conforms to these regulations or which is accepted pursuant to § 2007.2 a statement of the fact that the request has been received, the subject matter of the request (including if appropriate, the TSUS item number or numbers and description of the article or articles covered by the request), and a request for public comment on the petitions received shall be published in the FEDERAL REGISTER.

(b) Upon the completion of a review and publication of any Presidential action modifying the GSP, a summary of the decisions made will be published in the FEDERAL REGISTER including:

(1) A list of actions taken in response to requests; and

(2) A list of requests which are pending.

(c) Whenever, following a review, there is to be no change in the status of an article with respect to the GSP in response to a request filed under § 2007.0(a), the party submitting a request with respect to such articles may request an explanation of factors considered.

(d) Whenever, following a review, there is to be no change in the status of a beneficiary country with respect to the GSP in response to a request filed under § 2007.0(b), the GSP Subcommittee will notify the party submitting the request in writing of the reasons why the requested action was not taken.

§ 2007.5 Written briefs and oral testimony.

Sections 2003.2 and 2003.4 of this chapter shall be applicable to the submission of any written briefs or requests to present oral testimony in connection with a review under this part. For the purposes of this section, the term "interested party" as used in §§ 2003.2 and 2003.4 shall be interpreted as including parties submitting petitions and requests pursuant to § 2007.0(a) or (b) as well as any other person wishing to file written briefs or present oral testimony.

§ 2007.6 Information open to public inspection.

With exception of information subject to § 2007.7 any person may, upon request inspect at the Office of the United States Trade Representative:

(a) Any written request, brief, or similar submission of information made pursuant to this part; and

(b) Any stenographic record of any public hearings which may be held pursuant to this part.

§ 2007.7 Information exempt from public inspection.

(a) Information submitted in confidence shall be exempt from public inspection if it is determined that the disclosure of such information is not required by law.

(b) A party requesting an exemption from public inspection for information submitted in writing shall clearly mark each page "Submitted in Confidence" at the top, and shall submit a nonconfidential summary of the confidential information. Such person shall also provide a written explanation of why the material should be so protected.

(c) A request for exemption of any particular information may be denied if it is determined that such information is not entitled to exemption under law. In the event of such a denial, the information will be returned to the person who submitted it, with a statement of the reasons for the denial.

§ 2007.8 Other reviews of article eligibilities.

(a) As soon after the beginning of each calendar year as relevant trade data for the preceding year are available, modifications of the GSP in accordance with section 504(c) of the Trade Act of 1974 as amended (19 U.S.C. 2464) will be considered.

(b) *General Review.* Section 504(c)(2) of Title V of the Trade Act of 1974 as amended (19 U.S.C. 2464(c)(2)) requires that not later than January 4, 1987 and periodically thereafter, the President conduct a general review of eligible articles based on the considerations in sections 501 and 502 of Title V. The purpose of these reviews is to determine which articles from which beneficiary countries are "sufficiently competitive" to warrant a reduced competitive need limit. Those articles determined to be "sufficiently competitive" will be subject to a new lower competitive need limit set at 25 percent of the value of total U.S imports of the article, or $25 million (this figure will be adjusted annually in accordance with nominal changes in U.S. gross national product (GNP), using 1984 as the base year). All other articles will continue to be subject to the original competitive need limits of 50 percent or $25 million (this figure is adjusted annually using 1974 as the base year).

(1) *Scope of General Reviews.* In addition to an examination the competitiveness of specific articles from particular beneficiary countries, the general review will also include consideration of requests for competitive need limit waivers pursuant to section 504(c)(3)(A) of Title V of the Trade Act of 1974 as amended (19 U.S.C. 2464(c)) and requests for a determination of no domestic production under section 504(d)(1) of Title V of the Trade Act of 1974 as amended (19 U.S.C. 2464(d)(1)).

(2) *Factors To Be Considered.* In determining whether a beneficiary country should be subjected to the lower competitive need limits with respect to a particular article, the President shall consider the following factors contained in sections 501 and 502(c) of Title V:

(i) The effect such action will have on furthering the economic development of developing countries through expansion of their exports;

(ii) The extent to which other major developed countries are undertaking a comparable effort to assist developing countries by granting generalized preferences with respect to imports of products of such countries;

(iii) The anticipated impact of such action on the United States producers of like or directly competitive products;

(iv) The extent of the beneficiary developing country's competitiveness with respect to eligible articles;

(v) The level of economic development of such country, including its per capita GNP, the living standard of its inhabitants and any other economic factors the President deems appropriate;

(vi) Whether or not the other major developed countries are extending generalized preferential tariff treatment to such country;

(vii) The extent to which such country has assured the United States it will provide equitable and reasonable access to the markets and basic commodity resources of such country and the extent to which such country has assured the United States that it will refrain from engaging in unreasonable export practices;

(viii) The extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise and to enforce exclusive rights in intellectual property, including patents, trademarks and copyrights;

(ix) The extent to which such country has taken action to—

(A) Reduce trade distorting investment practices and policies (including export performance requirements); and

(B) Reduce or eliminate barriers to trade in services; and

(x) Whether or not such country has taken or is taking steps to afford workers in that country (including any designated zone in that country) internationally recognized worker rights.

PART 2008—REGULATIONS TO IMPLEMENT E.O. 12065; OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE

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AUTHORITY: E.O. 12065.

SOURCE: 44 FR 55329, Sept. 26, 1979, unless otherwise noted.

Subpart A—General Provisions

§ 2008.1 References.

(a) Executive Order 12065, "National Security Information," dated June 28, 1978.

(b) Information Security Oversight Office, Directive No. 1, "National Security Information," dated October 2, 1978.

§ 2008.2 Purpose.

The purpose of this regulation is to ensure, consistent with the authorities listed in section 1-1 of Executive Order 12065, that national security information originated or held by the Office of the Special Representative for Trade Negotiations is protected but only to the extent, and for the period, necessary to safeguard the national security.

§ 2008.3 Applicability.

This regulation governs the Office of the Special Representative for Trade Negotiations. In consonance with the authorities listed in section 1-1, it establishes the general policy and certain procedures for the security classification, downgrading, declassification, and safeguarding of information that is owned by, is produced for or by, or is under the control of the Office of the Special Representative for Trade Negotiations.

Subpart B—Classification

§ 2008.4 Basic policy.

It is the policy of the Office of the Special Representative for Trade Negotiations to make available to the public as much information concerning its activities as is possible, consistent with its responsibility to protect the national security.

§ 2008.5 Level of original classification.

Unnecessary classification, and classification at a level higher than is necessary, shall be avoided. If there is reasonable doubt as to which designation in section 1-1 of Executive Order 12065 is appropriate, or whether information should be classified at all, the less restrictive designation should be used, or the information should not be classified.

§ 2008.6 Duration of original classification.

(a) Except as permitted below, in paragraphs (b) and (c) of this section, information or material which is classified after December 1, 1978, shall be marked at the declassification no more than six years following its original classification.

(b) Original classification may be extended beyond six years only by officials with Top Secret classification authority and agency heads listed in section 1-2 of the order. This extension authority shall be used only when these officials determine that the basis for original classification will continue throughout the entire period that the classification will be in effect and only for the following reasons:

(1) The information is "foreign government information" as defined by the authorities in section 1.1;

(2) The information reveals intelligence sources and methods;

(3) The information pertains to communications security;

(4) The information reveals vulnerability or capability data, the unauthorized disclosure of which can reasonably be expected to render ineffective a system, installation, or project important to the national security;

(5) The information concerns plans important to the national security, the unauthorized disclosure of which reasonably can be expected to nullify the effectiveness of the plan;

(6) The information concerns specific foreign relations matters, the continued protection of which is essential to the national security;

(7) The continued protection of the information is specifically required by statute.

(c) Even when the extension of authority is exercised, the period of original classification shall not be greater than twenty years from the date of original classification, except that the original classification of "foreign government information" pursuant to paragraph (b)(1) of this section may be for a period of thirty years.

§ 2008.7 Challenges to classification.

If holders of classified information believe that the information is improperly or unnecessarily classified, or that original classification has been extended for too long a period, they should discuss the matter with their immediate superiors or the classifier of the information. If these discussions do not satisfy the concerns of the challenger, the matter should be brought to the attention of the chairperson of the Information Security Oversight Committee. Action on such challenges shall be taken 30 days from date of receipt and the challenger shall be notified of the results. When requested, anonymity of the challenger shall be preserved.

Subpart C—Derivative Classification

§ 2008.8 Definition and application.

Derivative classification is the act of assigning a level of classification to information that is determined to be the same in substance as information that is currently classified. Thus, derivative classification may be accomplished by any person cleared for access to that level of information, regardless of whether the person has original classification authority at that level.

§ 2008.9 Classification guides.

Classification guides shall be issued by the Management Office pursuant to section 2-2 of the order. These guides, which shall be used to direct derivative classification, shall identify the information to be protected in specific and uniform terms so that the information involved can be identified readily.

Subpart D—Declassification and Downgrading

§ 2008.10 Declassification authority.

The Special Representative for Trade Negotiations is authorized to declassify documents in accordance with section 3-3 of Executive Order 12065 and shall designate additional officials at the lowest practicable level to exercise declassification and downgrading authority.

§ 2008.11 Mandatory review for declassification.

(a) *Requests for mandatory review.* (1) Requests for mandatory review for declassification under section 3-501 of Executive Order 12065 must be in writing and should be addressed to:

Attn.: General Counsel (Mandatory Review Request), Office of the Special Representative for Trade Negotiations, 1800 G Street, NW., Washington, DC 20506.

(2) The requestor shall be informed of the date of receipt of the request. This date will be the basis for the time limits specified in paragraph (b) of this section.

(3) If the request does not reasonably describe the information sought, the requestor shall be notified that

unless additional information is provided or the request is made more specific, no further action will be taken.

(b) *Review.* (1) The requestor shall be informed of the Special Trade Representative's determination within sixty days of receipt of the initial request.

(2) If the determination is to withhold some or all of the material requested, the requestor may appeal the determination. The requestor shall be informed that such an appeal must be made in writing within sixty days of receipt of the denial and should be addressed to the chairperson of the Office of the Special Representative for Trade Negotiations Classification Review Committee.

(3) The requestor shall be informed of the appellate determination within thirty days of receipt of the appeal.

(c) *Fees.* (1) Fees for the location and reproduction of information that is the subject of a mandatory review request shall be assessed according to the following schedule:

(i) *Search for records:* $5.00 per hour when the search is conducted by a clerical employee; $8.00 per hour when the search is conducted by a professional employee. No fee shall be assessed for searches of less than one hour.

(ii) *Reproduction of documents:* Documents will be reproduced at a rate of $.25 per page for all copying of four pages or more. No fee shall be assessed for reproducing documents that are three pages or less, or for the first three pages of longer documents.

(2) When fees chargeable under this section will amount to more than $25, and the requestor has not indicated in advance a willingness to pay fees higher than that amount, the requestor shall be promptly notified of the amount of the anticipated fee or such portion thereof as can readily be estimated. In instances where the estimated fees will greatly exceed $25, an advance deposit may be required. Dispatch of such a notice or request shall suspend the running of the period for response by the Office of the Special Representative for Trade Negotiations until a reply is received from the requestor.

(3) Remittances shall be in the form either of a personal check or bank draft drawn on a bank in the United States, or a postal money order. Remittances shall be made payable to U.S. Treasurer and mailed to the Office of the Special Representative for Trade Negotiations, 1800 G St., NW., Washington, DC.

(4) A receipt for fees paid will be given only upon request. No refund of fees paid for services actually rendered will be made.

(5) The Office of the Special Representative for Trade Negotiations may waive all or part of any fee provided for in this section when it is deemed to be in the interest of either the Agency or the general public.

§ 2008.12 Foreign government information.

The Office of the Special Representative for Trade Negotiations shall, in consultation with the Archivist and in accordance with the provisions of section 3-404 of Executive Order 12065, develop systematic review guidelines for review of foreign government information for declassification thirty years from the date of original classification.

§ 2008.13 Systematic review guidelines.

Within 180 days after the effective date of the order, the Office of the Special Representative for Trade Negotiations shall, after consultation with the Archivist of the United States and review by the Information Security Oversight Office, issue and maintain guidelines for systematic review of classified information originated by the Office of the Special Representative for Trade Negotiations twenty years from the date of original classification. These guidelines shall state specific limited categories of information which, because of their national security sensitivity, should not be declassified automatically but should be reviewed item-by-item to determine whether continued protection beyond twenty years is needed. Information not identified in these guidelines as requiring review and for which a prior automatic declassification date has not been established shall be declassified automatically twenty years from the date of original classification.

Subpart E—Safeguards

§ 2008.14 Storage.

The Office of the Special Representative for Trade Negotiations shall store all classified material in accordance with ISOO Directive of October 5, 1978 (43 FR 46281).

§ 2008.15 General restrictions on access.

Access to classified information shall be restricted as required by section 4-1 of Executive Order 12065.

§ 2008.16 Security education program.

(a) The Office of the Special Representative for Trade Negotiations will inform agency personnel having access to classified information of all requirements of Executive Order 12065 and ISOO Directive I.

(b) The Director, Office of Management, shall be charged with the implementation of this security education program and shall issue detailed procedures for the use of the agency personnel in fulfilling their day-to-day security responsibilities.

§ 2008.17 Historical researchers and former Presidential appointees.

The requirement in section 4-101 of Executive Order 12065 with respect to access to classified information may be waived for historical researchers and former Presidential appointees in accordance with section 4-301 of that order.

Subpart F—Implementation and Review

§ 2008.18 Information Security Oversight Committee.

The Office of the Special Representative for Trade Negotiations Information Security Oversight Committee shall be co-chaired by the General Counsel of the Office of the Special Representative for Trade Negotiations and the Director, Office of Management. The chairs shall also be responsible with the Committee for conducting and active oversight program to ensure effective implementation of Executive Order 12065, and ISOO implementing directives. The Committe shall:

(a) Establish a security educatio program to inform personnel wh have access to classified informatio with the requirements of Executiv Order 12065, and ISOO implementin directives.

(b) Establish controls to ensure tha classified information is used, processed, stored, reproduced, and transmitted only under conditions that wil provide adequate protection and prevent access by unauthorized persons.

(c) Act on all suggestions and complaints concerning the administratio of the information security program.

(d) Establish and monitor policie and procedures within the Office o the Special Representative for Trad Negotiations to ensure the orderly an effective declassification of documents.

(e) Recommend to the Special Trad Representative appropriate administrative action to correct abuses or violations of any provision of Executiv Order 12065.

(f) Consider and decide other questions concerning classification and declassification that may be brough before it.

§ 2008.19 Classification Review Committee.

The Classification Review Committee shall be chaired by the Specia Trade Representative. The Committe shall decide appeals from denials o declassification requests submitte pursuant to section 3-5 of Executiv Order 12065. The Committee shal consist of Special Representative, tw Deputies and the General Counsel.

PART 2009—PROCEDURES FOR REPRESENTATIONS UNDER SECTIO 422 OF THE TRADE AGREEMENT ACT OF 1979

Sec.
2009.0 Submission of representation.
2009.1 Information required in representation.

§ 2009.0 Submission of representation.

(a) Any—(1) Part to the Agreement; or

(2) Foreign country that is not a Party to the Agreement but is found by the United States Trade Representative, ("Trade Representative") to extend rights and privileges to the United States that are substantially the same as those that would be so extended if that foreign country were a Party to the Agreement, may make a representation to the Trade Representative alleging that a standards-related activity engaged in within the United States violates the obligations of the United States under the Agreement on Technical Barriers to Trade.

(b) All representations under section 422 of the Trade Agreements Act of 1979 ("section 422") shall be addressed to the United States Trade Representative, Office of the United States Trade Representative, 600 17th Street, NW., Washington, DC 20506. Alternatively, such a representation may be made by diplomatic correspondence and may be accepted by the Trade Representative.

(c) "The Agreement", a "Party to the Agreement" and "standards-related activity" are defined as in section 451 of the Act (19 U.S.C. 2561).

(5 U.S.C. 301; 19 U.S.C. 2504(b), 2551–2554; E.O. 11846, 40 FR 14291; Reorganization Plan No. 3 of 1979, 44 FR 69173; E.O. 12188, 45 FR 989)

[47 FR 50207, Nov. 5, 1982]

§ 2009.1 Information required in representation.

(a) Each representation submitted under section 422 should state clearly on the first page that the representation is a request for action with respect to the obligations of the United States under the Agreement, and should contain the following information:

(1) The foreign country making the representation, the division of the foreign country's government representing that country's interest, the person(s) within the division who is (are) coordinating the foreign country's representation.

(2) A description of the standards-related activity at issues, including, whenever possible, copies of the standards-related activity's provisions.

(3) Identification of the foreign goods or services affected by the standards-related activity at issue.

(4) A statement of how the standards-related activity concerned is alleged to violate the obligations of the United States under the Agreement. This statement shoud indicate with particularity which such obligations are alleged to be violated.

(5) Indication as to whether the foreign country has officially petitioned, filed or complained for relief concerning the same subject matter as this representation to any international forum.

(b) Each representation submitted under section 422 of the Act must contain information sufficient to provide a reasonable indication that the standards-related activity concerned is having a significant trade effect, including (but not limited to) the volume of trade in the goods concerned.

(c) Representations should be submitted in 10 copies.

(5 U.S.C. 301; 19 U.S.C. 2504(b), 2551–2554; E.O. 11846, 40 FR 14291; Reorganization Plan No. 3 of 1979, 44 FR 69173; E.O. 12188, 45 FR 989)

[47 FR 50207, Nov. 5, 1982]

PART 2011—ALLOCATION OF TARIFF-RATE QUOTA ON IMPORTED SUGARS, SYRUPS AND MOLASSES

Subpart A—Certificates of Quota Eligibility

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2011.107 Issuance of certificates to foreign countries.
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Subpart B—Specialty Sugar

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2011.203 Issuance of specialty sugar certificates.
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Subpart C—Allocations for "Other Specified Countries and Areas"

2011.301 General Statement.
2011.302 Definitions.
2011.303 Allocation of individual import quotas.
2011.304 Applicability.
2011.305 Relationship to overall import quota.
2011.306 Paperwork Reduction Act assigned number.

AUTHORITY: Presidential Proclamation No. 6179, September 13, 1990 (55 FR 38293); additional U.S. note 3 to chapter 17 of the Harmonized Tariff Schedule of the United States (HTS) (19 U.S.C. 1202).

SOURCE: 55 FR 40648, Oct. 4, 1990, unless otherwise noted.

Subpart A—Certificate of Quota Eligibility

§ 2011.101 General statement.

This subpart sets forth the terms and conditions under which certificates of quota eligibility will be issued to foreign countries which have been allocated a share of the U.S. sugar tariff-rate quota. Except for specialty sugars covered by the regulations in subpart B of this part and except as otherwise provided in this subpart, sugars, syrups, and molasses described in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the Harmonized Tariff Schedule of the United States (HTS), imported from a foreign country, may not be entered or withdrawn from warehouse for consumption under such HTS suheadings unless such sugars, syrups, or molasses are accompanied by a certificate of quota eligibility. It has been determined that these regulations are necessary and appropriate to implement additional U.S. note 3 to chapter 17 of the HTS.

§ 2011.102 Definitions.

Unless the context otherwise requires, for the purpose of this subpart, the following terms shall have the meanings assigned below.

(a) *Additional U.S. note 3* means additional U.S. note 3 to chapter 17 of the HTS, including any amendments thereto.

(b) *Appropriate customs official* means the district or area Director of the U.S. Customs Service, his or her designee, or any other customs officer of similar authority and responsibility for the customs district in which the port of entry is located.

(c) *Certificate of quota eligibility* or "certificate" means a certificate issued by the Secretary to a foreign country or area which, when duly executed and issued by the certifying authority of such foreign country or area, authorizes the entry into the United States of sugar produced in such country under subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the HTS.

(d) *Certifying authority* means a person designated by the government of a foreign country who is authorized to execute and issue certificates of quota eligibility on behalf of such foreign country.

(e) *Entry* means entry, or withdrawal from warehouse, for consumption in the customs territory of the United States.

(f) *Foreign country* means any of the following foreign countries or areas: Argentina, Australia, Barbados, Belize, Boliva, Brazil, Canada, Columbia, Congo, Costa Rica, Cote d'Ivoire, Dominican Republic, Ecuador, El Salvador, Fiji, Gabon, Guatemala, Guyana, Haiti, Honduras, India, Jamaica, Madagascar, Malawi, Mauritius, Mexico, Mozambique, Nicaragua, Panama, Papua- New Guinea, Paraguay, Peru, Philippines, Saint Christopher-Nevis, Swaziland, Taiwan, Thailand, Trinidad-Tobago, Uruguay, and Zimbabwe.

(g) *Licensing Authority* means the Team Leader, Import Quota Programs, Import Policies and Trade Analysis Division, Foreign Agricultural Service, U.S. Department of Agriculture, or his or her designee.

(h) *Person* means an individual, partnership, corporation, association, estate, trust, or other legal entity, and, wherever applicable, any unit, instrumentality, or agency of a government, domestic or foreign.

(i) *Quota* means any tariff-rate quota on imports of sugars, syrups or molasses described in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, and 2106.90.11 of the HTS established and allocated pursuant to the provisions of paragraphs (a) and (b) of additional U.S. note 3 to chapter 17 of the HTS.

(j) *Quota period* means any period of time for which a quota for imports of sugar has been established in accordance with additional U.S. note 3.

(k) *Raw value* means, for a given quantity of sugar, the equivalent of that quantity of sugar in terms of ordinary commercial raw sugar testing 96 degrees by the polariscope as determined in accordance with regulations issued by the Secretary of the Treasury.

(l) *Secretary* means the Secretary of Agriculture or any officer or employee of the Department of Agriculture to whom the Secretary has delegated the authority or to whom the authority hereafter may be delegated to act in the Secretary's place.

(m) *Sugar* means sugar, syrups, and molasses described in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11, but does not include specialty sugars as defined in subpart B of this part, or, in the case of "sugar" which is the product of Canada, means sugar, syrups, and molasses described in subheadings 1701.11.02, 1701.11.03, 1701.12.02, 1701.91.22, 1701.99.02, 1702.90.32, 1806.10.42, or 2106.90.12 of the HTS, which is the product of Canada, but does not include specialty sugars as defined in subpart B of this part.

§ 2011.103 Entry into the United States.

(a) *General.* Except as otherwise provided herein (see §§ 2011.104 and 2011.109), no sugar described in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the HTS, which is the product of a foreign country or area, may be entered or withdrawn from warehouse for consumption after 12:01 a.m. October 1, 1990 unless at the time of entry the person entering such sugar presents to the appropriate customs official a valid and properly executed certificate of quota eligibility for such sugar. Except as otherwise provided herein (see §§ 2011.104 and 2011.109), no sugar described in subheadings 170.1.11.02, 1701.11.03, 1701.12.02, 1701.91.22, 1701.99.02, 1702.90.32, 1806.10.42, or 2106.90.12 of the HTS, which is the product of Canada, may be entered or withdrawn from warehouse for consumption after 12:01 a.m. October 1, 1990 unless at the time of entry the person entering such sugar presents to the appropriate customs official a valid and properly executed certificate of quota eligibility for such sugar.

(b) *Determinations of weight.* (1) For purposes of determining the amount of sugar which may be entered into the United States under a certificate of quota eligibility, sugar shall be entered on the basis of the actual weight of the sugar, as determined by the appropriate customs official. No adjustments in weight shall be made for the differences in polarization.

(2) The actual weight of the sugar entered into the United States may not exceed the weight specified on the certificate of quota eligibility by more than five percent. Such tolerance may be modified by the Secretary if the Secretary finds that such modification is appropriate to carry out the provisions of this subpart. Notice of any such modification shall be published by the Secretary in the FEDERAL REGISTER.

(3) The provisions of this paragraph shall not affect the manner in which the amount of sugar (raw value) entered into the United States is determined for purposes of administering the import quotas imposed under additional U.S. note 3 on sugar described in subheadings 1701.99.01, 1702.90.31, 1806.10.41, and 2106.90.11 of the HTS.

§ 2011.104 Waiver.

(a) *General.* The Secretary may waive, with respect to individual shipments, any or all of the requirements of this subpart if he or she determines that a waiver will not impair the proper operation of the sugar quota system, that it will not have the effect of modifying the allocation of sugar made pursuant to the provisions of paragraph (b) of additional U.S. note 3 to chapter 17 of the HTS, and that such waiver is justified by unusual, unavoidable, or otherwise appropriate circumstances. Such circumstances include, but are not limited to, loss or the destruction of the certificate, unavoidable delays in transmittal of the certificate to the port of entry, and clerical errors in the execution or issuance of the certificate.

(b) *Request for waiver.* The request for a waiver must be made to the Secretary in writing. The request need not follow any specific format. However, the request should set forth in detail all pertinent information relating to the shipment in question and the basis upon which the waiver should be granted.

(c) *Issuance of waiver.* The Secretary shall notify, in writing, the applicant for the waiver and the Secretary of the Treasury of any waiver granted under the authority of this section. The Secretary may attach any terms, conditions or limitations to the waiver which he or she determines are appropriate.

§ 2011.105 Form and applicability of certificate.

(a) *Contents.* Each certificate shall be numbered and identified by the foreign country. The certificate shall state that the quantity specified on the certificate is eligible to be entered into the United States during the applicable quota period. The certificate shall provide spaces into which the following information must be inserted by the certifying authority of the foreign country: Quantity eligible to be entered; name of shipper; name of vessel; and port of loading. The following information, if known, may also be specified on the certificate by the certifying authority: name and address of consignee; expected date of departure; expected date of arrival in U.S.; and expected port(s) of arrival in the United States. The certificate shall also provide an area where the certifying authority of the foreign country shall affix a seal or other form of authentication and sign and date the certificate.

(b) *Other limitations.* The Secretary may attach such other terms, limitations, or conditions to individual certificates of quota eligibility as he or she determines are appropriate to carry out the purposes of this subpart, provided that such other terms, limitations, or conditions will not have the effect of modifying the allocation of sugar made pursuant to the provisions of paragraph (b) of additional U.S. note 3 to chapter 17 of the HTS. Such terms, limitations or conditions may include, but are not limited to, maximum quantities per certificate and a specified period of time during which the certificate shall be valid. In no event shall the maximum quantity per certificate exceed 10,000 short tons.

(c) *Applicability of the certificate.* The certificate of quota eligibility shall only be applicable to the shipment of sugar for which it was executed and issued by the certifying authority.

§ 2011.106 Agreements with foreign countries.

Agreements or arrangements providing for the certificate system may be entered into by the United States Government with the governments of foreign countries. Such agreements or arrangements may provide for the designation of certifying authorities, the designation of seals or other forms of authentication, the transmittal and exchange of pertinent information, and other appropriate means or forms of cooperation.

§ 2011.107 Issuance of certificates to foreign countries.

(a) *Amount and timing.* The Secretary may issue certificates of quota eligibility to foreign countries for any quota period in such amounts and at such times as he or she determines are appropriate to enable the foreign country to fill its quota allocation for such quota period in a reasonable manner, taking into account traditional shipping patterns, harvesting period, U.S. import requirements, and other relevant factors.

(b) *Adjustments.* The Secretary may adjust the amount of certificates issued to a certifying authority for any quota period, provided that such adjustment will not have the effect of modifying the allocation of sugar made pursuant to the provisions of paragraph (b) of additional U.S. note 3 to chapter 17 of the HTS, in order to reflect:

(1) The amount of sugar entered into warehouse during previous quota periods;

(2) Anticipated differences in actual weight and weight determined on a raw value basis; and

(3) Other relevant factors.

§ 2011.108 Execution and issuance of certificates by the certifying authority.

(a) *Execution.* The certificate of quota eligibility shall be executed by the certifying authority by:

(1) Entering on the certificate the information required under § 2011.105 of this subpart; and

(2) Affixing a seal or other form of authentication to the certificate.

(b) *Issuance.* The executed certificate shall be issued by the certifying authority to the shipper or consignee specified on the certificate.

(c) *Modifications by the certifying authority.* The terms and conditions set forth in the certificate may not be modified, added to, or deleted by the certifying authority without the prior written approval of the Secretary.

(d) A certificate shall not be considered valid unless it is executed and issued in accordance with this section.

§ 2011.109 Suspension or revocation of individual certificates.

(a) *Suspension or revocation.* The Secretary may suspend, revoke, modify or add further limitations to any certificate if the Secretary determines that such action or actions is necessary to ensure the effective operation of the import quota system for sugar and that such suspension, revocation, modification or addition of further limitations will not have the effect of modifying the allocation of sugar made pursuant to the provisions of paragraph (b) of additional U.S. note 3 to chapter 17 of the HTS.

(b) *Reinstatement.* The Secretary may reinstate or reissue any certificate which was previously suspended, revoked, modified, or otherwise limited under the authority of this section.

§ 2011.110 Suspension of certificate system.

(a) *Suspension.* The U.S. Trade Representative may suspend the provisions of this subpart whenever he or she determines that such action gives due consideration to the interests in the U.S. sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade. Notice of such suspension and the effective date thereof shall be published in the FEDERAL REGISTER.

(b) *Reinstatement.* The U.S. Trade Representative may at any time reinstate the operation of this subpart if he or she finds that the conditions set forth in paragraph (a) of this section no longer apply. Notice of such reinstatement and the effective date thereof shall be published in the FEDERAL REGISTER.

(c) *Transitional provisions.* In the case of any suspension or reinstatement of the certificate system established by this subpart, the Secretary, in consultation with the United States Trade Representative, may prescribe such additional guidelines, instructions, and limitations which shall be applied or implemented by appropriate customs officials in order to ensure an orderly transition.

Subpart B—Specialty Sugar

§ 2011.201 General statement.

This subpart sets forth the terms and conditions under which specialty sugar certificates will be issued to U.S. importers for importing specialty sugars from countries set forth in additional U.S. note 3(b)(i) to chapter 17 of the Harmonized Tariff Schedule of the United States (HTS). Specialty sugars imported from such countries may not be entered under subheadings

1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the HTS unless accompanied by a specialty sugar certificate. It has been determined that the regulations in this subpart are necessary and appropriate to implement authority conferred on the United States Trade Representative by additional U.S. note 3 to chapter 17 of the HTS. It has further been determined that these regulations give consideration to the interests in the U.S. sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade (GATT), and that these regulations are necessary and appropriate to assist in fulfilling U.S. obligations under the GATT.

§ 2011.202 Definitions.

Unless the context otherwise requires, for the purpose of this subpart, the following terms shall have the meanings assigned below.

(a) *Appropriate Customs official* means the District or Area Director of Customs, his or her designee, or any other Customs officer of similar authority and responsibility for the Customs district in which the port of entry is located.

(b) *Certificate* means a specialty sugar certificate issued by the Certifying Authority permitting the entry of specialty sugar as defined in this section.

(c) *Certifying Authority* means the Team Leader, Import Quota Programs, Foreign Agriculture Service, U.S. Department of Agriculture, or his or her designee.

(d) *Date of entry* means the date on which the appropriate Customs entry form is properly executed and deposited, together with any estimated duties and special import fees and any related documents required by law or regulation to be filed with such form at the time of entry with the appropriate Customs Officer.

(e) *Importer* means any person in the United States importing specialty sugar into the United States.

(f) *Person* means any individual, partnership, corporation, association, estate, trust, or any other business entity, and, whenever applicable, any unit, instrumentality, or agency, of a government, domestic or foreign.

(g) *Other specialty sugar source countries* means the following countries: Belgium, Burma, Cameroon, Denmark, Federal Republic of Germany, France, Hong Kong, Indonesia, Ireland, Italy, Japan, Kenya, Luxembourg, Netherlands, Netherlands Antilles, People's Republic of China, Republic of Korea, Republic of Yemen, Surinam, Sweden, Switzerland, United Kingdom, and Venezuela.

(h) *Quota* means any tariff-rate quota on imports of any sugars, sirups, or molasses provided for in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, and 2106.90.11 of the HTS applied under the authority of additional U.S. note 3 to chapter 17 of the HTS and any modifications thereto.

(i) *Secretary* means the Secretary of Agriculture or any officer of employee of the Department of Agriculture to whom the Secretary has delegated the authority or to whom the authority hereafter may be delegated to act in his place.

(j) *Specialty sugar* means brown slab sugar (also known as slab sugar candy), pearl sugar (also known as perl sugar, perle sugar, and nibs sugar), vanilla sugar, rock candy, demerara sugar, silver dragees for cooking and baking, white fondant (a creamy blend of sugar and glucose), ti light sugar (99.2% sugar with the residual comprised of the artificial sweeteners aspartame and acesulfame K), caster sugar, golden syrup, and ferdiana granella grossa, which in addition:

(1) Are sugars, syrups, or molasses described in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the Harmonized Tariff Schedule of the United States.

(2) Are the product of a country listed among the "other specialty sugar source countries," and

(3) Require no further refining, processing, or other preparation prior to consumption, other than incorporation as an ingredient in human food.

§ 2011.203 Issuance of specialty sugar certificates.

(a) Specialty sugars imported into the United States from other specialty sugar source countries may be entered under subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the HTS only if such specialty sugars are accompanied by a certificate issued by the Certifying Authority.

(b) A certificate may be issued to an importer who complies with the provisions of this part. The certificate may contain such conditions, limitations or restrictions as the Certifying Authority, in his discretion, deems necessary. The Certifying Authority will issue a certificate if sufficient evidence has been provided to permit the Certifying Authority to make a reasonable determination that the sugar proposed to be imported under the certificate fits the definition of specialty sugars in this subpart.

(c) Subject to quota availability, an unlimited number of complying shipments may enter under a given certificate and a given certificate may cover more than one type of specialty sugar. Issuance of a certificate does not guarantee the entry of any specific shipment of specialty sugars under subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the HTS, but only permits entry of such sugar under such HTS subheadings if the applicable quota or quotas are not already filled.

§ 2011.204 Entry of specialty sugars.

An importer or his or her agent must present a certificate to the appropriate Customs official at the time of entry of specialty sugars. Entry of specialty sugars under subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the HTS shall be allowed only in conformity with the description of sugars and other conditions, if any, stated in the certificate.

§ 2011.205 Application for a specialty sugar certificate.

Applicants for certificates for the import of specialty sugars must apply in writing to the Certifying Authority. Such letter of application shall contain the following information:

(a) The name and address of the applicant;

(b) A statement of the anticipated quantity of specialty sugars to be imported, if known;

(c) The appropriate six digit HTS subheading number;

(d) A description of the specialty sugar the importer expects to import during the period of the certificate, including the manufacturer's or exporter's usual trade name or designation and use of such specialty sugar, and the importer's use of such specialty sugar;

(e) Sufficient evidence to permit the Certifying Authority to make a reasonable determination that such sugars are specialty sugars within the definition of specialty sugars in this subpart;

(f) The name of the anticipated consumer of the specialty sugars, if known at time of application; and

(g) The anticipated date of entry, if known at time of application.

The Certifying Authority may waive any provision of this section for good cause if her or she determines that such a waiver will not adversely affect the implementation of this subpart.

§ 2011.206 Suspension or revocation of individual certificates.

(a) *Suspension or revocation.* The Certifying Authority may suspend, revoke, modify or add limitations to any certificate which has been issued if he or she determines that such action or actions is necessary to ensure the effective operation of the quota for specialty sugars or determines that the importer has failed to comply with the requirements of this subpart.

(b) *Reinstatement.* The Certifying Authority may reinstate or restore any certificate which was previously suspended, revoked, modified or otherwise limited under the authority of this section.

(c) The determination of the Certifying Authority under paragraph (a) of this section that the importer has failed to comply with the requirements of this subpart may be appealed to the Director, Import Policy and

Trade Analysis Division, Foreign Agriculture Service (FAS), U.S. Department of Agriculture, Washington, DC 20250, within 30 days from the date of suspension or revocation. The request for reconsideration shall be presented in writing and shall specifically state the reason or reasons why such determination should not stand. The Director, Import Policy and Trade Analysis Division, Foreign Agriculture Service (FAS), U.S. Department of Agriculture, Washington, DC 20250, will provide such person with an opportunity for an informal hearing on such matter. A further appeal may be made to the Administrator, FAS, U.S. Department of Agriculture, Washington, DC 20250, within five working days of receipt of the notification of the Director's decision. The Certifying Authority may take action under paragraph (b) of this section during the pendency of any appeal.

§ 2011.207 Suspension of the certificate system.

(a) *Suspension.* The U.S. Trade Representative may suspend the provisions of this subpart whenever he or she determines that the quota provided for in additional note 3 to chapter 17 of the HTS is no longer in force or that this subpart is no longer necessary to implement those provisions. Notice of such suspension and the effective date thereof shall be published in the FEDERAL REGISTER.

(b) *Reinstatement.* The U.S. Trade Representative may at any time reinstate the operation of this subpart if he or she finds that the conditions set forth in paragraph (a) of this section no longer apply. Notice of such reinstatement and the effective date thereof shall be published in the FEDERAL REGISTER.

(c) *Transitional provisions.* In the case of any suspension or reinstatement of the certificate system established by this subpart, the Certifying Authority may prescribe such additional guidelines, instructions, and limitations which shall be applied or implemented by appropriate Customs officials in order to ensure an orderly transition.

Subpart C—Allocations for "Other Specified Countries and Areas"

§ 2011.301 General Statement.

This subpart sets forth the manner in which individual allocations of the tariff-rate quota will be calculated for those countries listed as "Other specified countries and areas" in paragraph (b)(i) of additional U.S. note 3 to chapter 17 of the Harmonized Tariff Schedule of the United States (HTS). It has been determined that the regulations in this subpart are necessary and appropriate to provide reasonable access to the U.S. sugar market to countries listed as "Other specified countries and areas." It has further been determined that these regulations give due consideration to the interests in the U.S. sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade.

§ 2011.302 Definitions.

Unless the context otherwise requires, for the purpose of this subpart, the following terms shall have the meanings assigned below.

(a) *Individual quota amount* means a specific quantity of sugars, syrups and molasses described in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, or 2106.90.11 of the HTS, that may be imported from each country and area included in the category of "Other specified countries and areas."

(b) *Other specified countries and areas* means the following countries and areas: Congo, Cote d'Ivoire, Gabon, Haiti, Madagascar, Mexico, Papua-New Guinea, Paraguay, Saint Christopher-Nevis, and Uruguay.

(c) *Quota* means any tariff-rate quota on imports of sugars, syrups or molasses described in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 180.10.41, and 2106.90.11 of the HTS established under the provisions of paragraph (a) of additional U.S note 3 to chapter 17 of the HTS.

(d) *Total quota amount* means the total amount, as established by the Secretary of Agriculture, of sugars, syrups and molasses described in subheadings 1701.11.01, 1701.12.01, 1701.91.21, 1701.99.01, 1702.90.31, 1806.10.41, and 2106.90.11 of the HTS, that may be entered or withdrawn from warehouse for consumption, during such period as shall be established by the Secretary of Agriculture.

§ 2011.303 Allocation of individual import quota

(a) Each foreign country and area in the category of "Other specified countries and areas" shall be allocated an individual quota amount for each quota period.

(b) The individual quota amount for each country and area in the category of "Other specified countries and areas" shall be the greater of:

(1) The pro rata share of the total quota amount allocated to the category "Other specified countries and areas" for each quota period in question;

(2) 7,258 metric tons, raw value; or

(3) Such other minimum quota amount as shall be determined by the United States Trade Representative to be appropriate to provide reasonable access to the U.S. market for imports from the other specified countries and area.

(c) Notwithstanding paragraph (b) of this section, the United States Trade Representative may provide for the allocation to other specified countries and areas of other individual quota amounts for specific time periods, or other special rules or limitations, in order to ensure an orderly transition in the following circumstances:

(1) The addition or deletion of a country or area to or from the category "Other specified countries and areas;" or

(2) A change from an annual quota period (October 1–September 30) to another quota period.

Notice of any such quotas, rules, or limitations shall be published in the FEDERAL REGISTER.

§ 2011.304 Applicability.

This subpart shall be applicable to the quota period beginning October 1, 1990, and all subsequent quota periods.

§ 2011.305 Relationship to overall import quota.

The allocation of minimum quota amounts to the "Other specified countries and areas" may result in a quota allocation for such category which is in excess of that category's percentage allocation of quota.

§ 2011.306 Paperwork Reduction Act assigned number.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in the regulations in this subpart in accordance with 44 U.S.C. chapter 25 and OMB control number 0551-0014 has been assigned.

Appendix A to Chapter XX—Administration of the Trade Agreements Program

Text of Executive Order No. 11846 of Mar. 27, 1975 (40 FR 14291).

By virtue of the authority vested in me by the Trade Act of 1974, hereinafter referred to as the Act (Pub. L. 93-618, 88 Stat. 1978), the Trade Expansion Act of 1962, as amended (19 U.S.C. 1801), section 350 of the Tariff Act of 1930, as amended (19 U.S.C. 1351), and section 301 of Title 3 of the United States Code, and as President of the United States, it is hereby ordered as follows:

SECTION 1. *The Trade Agreements Program.* The "trade agreements program" includes all activities consisting of, or related to, the negotiation or administration of international agreements which primarily concern trade and which are concluded pursuant to the authority vested in the President by the Constitution, section 350 of the Tariff Act of 1930, as amended, the Trade Expansion Act of 1962, as amended, or the Act.

SEC. 2. *The Special Representative for Trade Negotiations.* (a) The Special Representative for Trade Negotiations, hereinafter referred to as the Special Representative, in addition to the functions conferred upon him by the Act, including section 141 thereof, and in addition to the functions and responsibilities set forth in this Order, shall be responsible for such other functions as the President may direct.

(b) The Special Representative, except where otherwise expressly provided by statute, Executive order, or instructions of the President, shall be the chief representative of the United States for each negotiation under the trade agreements program and shall participate in other negotiations which may have a direct and significant impact on trade.

(c) The Special Representative shall prepare, for the President's transmission to Congress, the annual report on the trade agreements program required by section 163(a) of the Act. At the request of the Special Representative, other agencies shall assist in the preparation of that report.

(d) The Special Representative, except where expressly otherwise provided or prohibited by statute, Executive order, or instructions of the President, shall be responsible for the proper administration of the trade agreements program, and may, as he deems necessary, assign to the head of any Executive agency or body the performance of his duties which are incidental to the administration of the trade agreements program.

(e) The Special Representative shall consult with the Trade Policy Committee in connection with the performance of his functions, including those established or delegated by this Order, and shall, as appropriate, consult with otner Federal agencies or bodies. With respect to the performance of his functions under Title IV of the Act, including those established or delegated by this Order, the Special Representative shall also consult with the East-West Foreign Trade Board.

(f) The Special Representative shall be responsible for the preparation and submission of any Proclamation which relates wholly or primarily to the trade agreements program. Any such Proclamation shall be subject to all the provisions of Executive Order 11030, as amended, except that such Proclamation need not be submitted to the Director of the Office of Management and Budget.

(g) The Secretary of State shall advise the Special Representative, and the Committee, on the foreign policy implications of any action under the trade agreements program. The Special Representative shall invite appropriate departments to participate in trade negotiations of particular interest to such departments, and the Department of State shall participate in trade negotiations which have a direct and significant impact on foreign policy.

SEC. 3. *The Trade Policy Committee.* (a) As provided by section 242 of the Trade Expansion Act of 1962 (19 U.S.C. 1872), as amended by section 602(b) of the Act, there is established the Trade Policy Committee hereinafter referred to as the Committee. The Committee shall be composed of:

(1) The Special Representative, who shall be Chairman.

(2) The Secretary of State.

(3) The Secretary of the Treasury.

(4) The Secretary of Defense.

(5) The Attorney General.

(6) The Secretary of the Interior.

(7) The Secretary of Agriculture.

(8) The Secretary of Commerce.

(9) The Secretary of Labor.

(10) The Assistant to the President for Economic Affairs.

(11) The Executive Director of the Council on International Economic Policy. Each member of the Committee may designate an officer of his agency, whose status is not below that of an Assistant Secretary, to serve in his stead, when he is unable to attend any meetings of the Committee. The Chairman, as he deems appropriate, may invite representatives from other agencies to attend the meetings of the Committee.

(b) The Committee shall have the functions conferred by the Trade Expansion Act of 1962, as amended, upon the inter-agency organization referred to in section 242 thereof, as amended, the functions delegated to it by the provisions of this Order, and such other functions as the President may from time to time direct. Recommendations and advice of the Committee shall be submitted to the President by the Chairman.

(c) The recommendations made by the Committee under section 242(b)(1) of the Trade Expansion Act of 1962, as amended, with respect to basic policy issues arising in the administration of the trade agreements program, as approved or modified by the President, shall guide the administration of the trade agreements program. The Special Representative or any other officer who is chief representative of the United States in a negotiation in connection with the trade agreements program shall keep the Committee informed with respect to the status and conduct of negotiations and shall consult with the Committee regarding the basic policy issues arising in the course of negotiations.

(d) Before making recommendations to the President under section 242(b)(2) of the Trade Expansion Act of 1962, as amended, the Committee shall, through the Special Representative, request the advice of the Adjustment Assistance Coordinating Committee, established by section 281 of the Act.

(e) The Committee shall advise the President as to what action, if any, he should take under section 337(g) of the Tariff Act of 1930, as amended by section 341 of the Act, relating to unfair practices in import trade.

(f) The Trade Expansion Act Advisory Committee established by Section 4 of Executive Order 11075 of January 15, 1963, is abolished and all of its records are transferred to the Trade Policy Committee.

SEC. 4. *Trade Negotiations Under Title I of the Act.* (a) The functions of the President under section 102 of the Act concerning notice to, and consultation with, Congress, in connection with agreements on nontariff barriers to, and other distortions of, trade, are hereby delegated to the Special Representative.

(b) The Special Representative, after consultation with the Committee, shall prepare, for the President's transmission to Congress, all proposed legislation and other documents necessary or appropriate for the implementation of, or otherwise required in connection with, trade agreements; provided, however, that where implementation of an agreement on nontariff barriers to, and other distortions of, trade requires a change in a domestic law, the department or agency having the primary interest in the administration of such domestic law shall prepare and transmit to the Special Representative the proposed legislation necessary or appropriate for such implementation.

(c) The functions of the President under section 131(c) of the Act with respect to advice of the International Trade Commission and under section 132 of the Act with respect to advice of the departments of the Federal Government and other sources, are delegated to the Special Representative. The functions of the President under section 133 of the Act with respect to public hearings in connection with certain trade negotiations are delegated to the Special Representative, who shall designate an interagency committee to hold and conduct any such hearings.

(d) The functions of the President under section 135 of the Act with respect to advisory committees and, notwithstanding the provisions of any other Executive order, the functions of the President under the Federal Advisory Committee Act (86 Stat. 770, 5 U.S.C. App. I), except that of reporting annually to Congress, which are applicable to advisory committees under the Act are delegated to the Special Representative. In establishing and organizing general policy advisory committees or sector advisory committees under section 135(c) of the Act, the Special Representative shall act through the Secretaries of Commerce, Labor and Agriculture, as appropriate.

(e) The functions of the President with respect to determining ad valorem amounts and equivalents pursuant to sections 601 (3) and (4) of the Act are hereby delegated to the Special Representative. The International Trade Commission is requested to advise the Special Representative with respect to determining such ad valorem amounts and equivalents. The Special Representative shall seek the advice of the Commission and consult with the Committee with respect to the determination of such ad valorem amounts and equivalents.

(f) Advice of the International Trade Commission under section 131 of the Act, and other advice or reports by the International Trade Commission to the President or the Special Representative, the release or disclosure of which is not specifically authorized or required by law, shall not be released or disclosed in any manner or to any extent not specifically authorized by the President or by the Special Representative.

SEC. 5. *Import Relief and Market Disruption.* (a) The Special Representative is authorized to request from the International Trade Commission the information specified in sections 202(d) and 203(i) (1) and (2) of the Act.

(b) The Secretary of the Treasury, in consultation with the Secretary of Commerce or the Secretary of Agriculture, as appropriate, is authorized to issue, under section 203(g) of the Act, regulations governing the administration of any quantitative restrictions proclaimed in order to provide import relief and is authorized to issue, under section 203(g) of the Act or 352(b) of the Trade Expansion Act of 1962, regulations governing the entry, or withdrawal from warehouses for consumption, of articles pursuant to any orderly marketing agreement.

(c) The Secretary of Commerce shall exercise primary responsibility for monitoring imports under any orderly marketing agreement.

SEC. 6. *Unfair Trade Practices.* (a) The Special Representative, acting through an interagency committee which he shall designate for such purpose, shall provide the opportunity for the presentation of views, under sections 301(d)(1) and 301(e)(1) of the Act, with respect to unfair or unreasonable foreign trade practices and with respect to the United States response thereto.

(b) The Special Representative shall provide for appropriate public hearings under section 301(e)(2) of the Act; and, shall issue regulations concerning the filing of requests for, and the conduct of, such hearings.

(c) The Special Representative is authorized to request, pursuant to section 301(e)(3) of the Act, from the International Trade Commission, its views as to the probable impact on the economy of the United States of any action under section 301(a) of the Act.

SEC. 7. *East-West Foreign Trade Board.* (a) In accordance with section 411 of the Act, there is hereby established the East-West Foreign Trade Board, hereinafter referred to as the Board. The Board shall be composed of the following members and such additional members of the Executive branch as the President may designate:

(1) The Secretary of State.

(2) The Secretary of the Treasury.

(3) The Secretary of Agriculture.

(4) The Secretary of Commerce.

(5) The Special Representative for Trade Negotiations.

(6) The Director of the Office of Management and Budget.

(7) The Executive Director of the Council on International Economic Policy.

(8) The President of the Export-Import Bank of the United States.

(9) The Assistant to the President for Economic Affairs.

The President shall designate the Chairman and the Deputy Chairman of the Board. The President may designate an Executive Secretary, who shall be Chairman of a working group which will include membership from the agencies represented on the Board.

(b) The Board shall perform such functions as are required by section 411 of the Act and such other functions as the President may direct.

(c) The Board is authorized to promulgate such rules and regulations as are necessary or appropriate to carry out its responsibilities under the Act and this Order.

(d) The Secretary of State shall advise the President with respect to determinations required to be made in connection with sections 402 and 409 of the Act (dealing with freedom of emigration) and section 403 (dealing with United States personnel missing in action in Southeast Asia), and shall prepare, for the President's transmission to Congress, the reports and other documents required by sections 402 and 409 of the Act.

(e) The President's Committee on East-West Trade Policy, established by Executive Order 11789 of June 25, 1974, as amended by section 6(d) of Executive Order 11808 of September 30, 1974, is abolished and all of its records are transferred to the Board.

SEC. 8. *Generalized System of Preferences.* (a) The Special Representative, in consultation with the Secretary of State, shall be responsible for the administration of the generalized system of preferences under Title V of the Act.

(b) The Committee, through the Special Representative, shall advise the President as to which countries should be designated as beneficiary developing countries, and as to which articles should be designated as eligible articles for the purposes of the system of generalized preferences.

SEC. 9. *Prior Executive Orders.* (a) Executive Order 11789 of June 25, 1974, and Section 6(d) of Executive Order 11808 of September 30, 1974, relating to the President's Committee on East-West Trade Policy are hereby revoked.

(b)(1) Sections 5(b), 7, and 8 of the Executive Order 11075 of January 15, 1963, are hereby revoked effective April 3, 1975; (2) the remainder of Executive Order 11075, and Executive Order 11106 of April 18, 1963 and Executive Order 11113 of June 13, 1963, are hereby revoked.

[40 FR 18422, Apr. 28, 1975]

Subtitle D—Regulations Relating to Telecommunications and Information

CHAPTER XXIII—NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION, DEPARTMENT OF COMMERCE

(Parts 2300-2399)

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PART 2301—PUBLIC TELECOMMUNICATIONS FACILITIES PROGRAM

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APPENDIX TO PART 2301—PRIORITIES

AUTHORITY: Public Telecommunications Financing Act of 1978, Pub. L. 95-567, 92 Stat. 2405, codified at 47 U.S.C. 390-394, 397-399b; and the Public Broadcasting Amendments Act of 1981, Pub. L. 97-35, 95 Stat. 725, and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, sec. 5001, 100 Stat. 82, 117 (1986).

SOURCE: 52 FR 31499, Aug. 20, 1987, unless otherwise noted.

Subpart A—Definitions, Program Purposes and Special Consideration

§ 2301.1 Definitions.

"Act" means Part IV of Title III of the Communications Act of 1934, 47 U.S.C. 390–394 and 397–399b, as amended.

"Administrator" means the Assistant Secretary for Communications and Information of the United States Department of Commerce.

"Agency" means the National Telecommunications and Information Administration of the United States Department of Commerce.

"Broadcast" means the distribution of electronic signals to the public at large using television (VHF or UHF) or radio (AM or FM) technologies.

"Construction" (as applied to public telecommunications facilities) means acquisition (including acquisition by lease), installation, and improvement of public telecommunications facilities and preparatory steps incidental to any such acquisition, installation or improvement.

"FCC" means the Federal Communications Commission.

"Federal interest period" means the period of time during which the Federal Government retains a reversionary interest in all facilities constructed with Federal grant funds. This period begins with the purchase of the facilities and continues for ten (10) years after the official completion date of the project.

"Nonbroadcast" means the distribution of electronic signals by a means other than broadcast technologies. Examples of nonbroadcast are ITFS, teletext, and cable.

"Noncommercial educational broadcast station" or a "public broadcast station" means a television or radio broadcast station which is eligible to be licensed by the FCC as a noncommercial educational radio or television broadcast station and which is owned (controlled) and operated by a state, a political or special purpose subdivision of a state, public agency or nonprofit private foundation, corporation, institution, or association, or owned (controlled) and operated by a municipality and transmits only noncommercial educational, cultural or instructional programs.

"Noncommercial telecommunications entity" means any enterprise which is owned (controlled) and operated by a state, a political or special purpose subdivision of a state, a public agency, or a nonprofit private foundation, corporation, institution, or association; and which has been organized primarily for the purpose of disseminating audio or video noncommercial educational, cultural or instructional programs to the public by means other than a primary television or radio broadcast station, including, but not limited to, coaxial cable, optical fiber, broadcast translators, cassettes, discs, satellite, microwave or laser transmission.

"Non-Federal financial support" means the total value of cash and the fair market value of property and services received—

(a) As gifts, grants, bequests, donations, or other contributions for the construction or operation of noncommercial educational broadcast stations, or for the production, acquisition, distribution, or dissemination of educational, cultural or instructional television or radio programs, and related activities, from any source other than (1) the United States or any agency or instrumentality of the United States; or (2) any public broadcasting entity; or

(b) As gifts, grants, donations, contributions, or payments from any State, or any educational institution, for the construction or operation of noncommercial educational broadcast stations or for the production, acquisition, distribution, or dissemination of educational, cultural or instructional television or radio programs, or payments in exchange for services or materials with respect to the provision of educational, cultural or instructional television or radio programs.

"Nonprofit" (as applied to any foundation, corporation, institution or association) means a foundation, corporation, institution, or association, no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

"Operational cost" means those approved costs incurred in the operation of an entity or station such as overhead labor, material, contracted services (such as building or equipment maintenance), including capital outlay and debt service.

"Preoperational expenses" means all nonconstruction costs incurred by new public telecommunications entities before the date on which they began providing service to the public, and all nonconstruction costs associated with the expansion of existing stations before the date on which such expanded capacity is activated, except that such expenses shall not include any portion of the salaries of any personnel employed by an operating public telecommunications entity.

"PTFP" means the Public Telecommunications Facilities Program, which is administered by the Agency.

"PTFP Director" means the Agency employee who recommends final action on public telecommunications facilities applications and grants to the Administrator.

"Public telecommunications facilities" means apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming, including but not limited to studio equipment, cameras, microphones, audio and video storage or processors and switchers, terminal equipment, towers, antennas, transmitters, remote control equipment, transmission line, translators, microwave equipment, mobile equipment, satellite communications equipment, instructional television fixed service equipment, subsidiary communications authorization transmitting and receiving equipment, cable television equipment, optical fiber communications equipment and other means of transmitting, emitting, storing, and receiving images and sounds or information, except that such term does not include the buildings to house such apparatus (other than small equipment shelters which are part of satellite earth stations, translators, microwave interconnection facilities, and similar facilities).

"Public telecommunications services" means noncommercial educational and cultural radio and television programs, and related noncommercial instructional or informational material that may be transmitted by means of electronic communications. It does not include essentially sectarian programming.

"Sectarian" means that which has the purpose or function of advancing or propagating a religious belief.

"State" includes each of the fifty states, the District of Columbia, the

Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands.

"System of public telecommunications entities" means any combination of public telecommunications entities acting cooperatively to produce, acquire or distribute programs, or to undertake related activities.

§ 2301.2 Program purposes.

(a) The Agency's determination to fund an application and the amount of the grant awarded shall be governed by whether the application will, in the following order of priority, result in:

(1) The establishment of new public telecommunications facilities to extend services to areas not currently receiving such services;

(2) The expansion of the service areas of existing public telecommunications entities; or,

(3) The improvement of the capabilities of existing licensed public broadcasting stations to provide public telecommunications services.

(b) Notwithstanding paragraph (a) of this section, the Agency may award a grant to an applicant which is otherwise eligible for funding, but whose proposal does not specifically meet any of the purposes enumerated above. Such grant, however, must fulfill the overall objectives of the Act.

§ 2301.3 Special consideration.

In accordance with section 392(f) of the Act, the Agency will give special consideration to applications which foster ownership or control of, operation of, and participation in public telecommunications entities by minorities and women. The Agency interprets "ownership" and "owned" as meaning control of an entity through the possession or exercise of the normal incidents of ownership, such as participation on the governing board or holding corporate offices. The Agency will accord special consideration only where women and/or minorities hold more than fifty (50) percent control of the applicant. The Agency will consider the composition of the applicant's governing body, management levels, or policy-making positions.

Subpart B—Eligibility and Application Procedures

§ 2301.4 Eligible organizations and projects.

(a) *Eligible applicants* (*Construction Grants*). In order to apply for and receive a PTFP Construction Grant, an applicant must be:

(1) A public or noncommercial educational broadcast station;

(2) A noncommercial telecommunications entity;

(3) A system of public telecommunications entities;

(4) A nonprofit foundation, corporation, institution, or association organized primarily for educational or cultural purposes; or,

(5) A state or local government or agency, or a political or special purpose subdivision of a state.

(b) *Eligible applicants* (*Planning Grants*). In order to apply for and receive a PTFP Planning Grant, an applicant must be:

(1) Any of the organizations described in paragraph (a) of this section; or,

(2) A nonprofit foundation, corporation, institution, or association organized for any purpose except primarily religious.

(c) *Eligible projects*. An applicant which is eligible under paragraph (a) or (b) of this section may file an application with the Agency for a planning or construction grant to achieve the following:

(1) The provision of new public telecommunications facilities to extend service to areas currently not receiving public telecommunications services;

(2) The expansion of the service areas of existing public telecommunications entities;

(3) The establishment of new public telecommunications entities serving areas currently receiving public telecommunications services; or,

(4) The improvement of the capabilities of existing licensed public broadcast stations to provide public telecommunications services.

(d) An applicant with outstanding accounts receivable with any agency of the Department of Commerce will not receive a PTFP grant until the debt is paid or arrangements to repay, which are satisfactory to the Department, are made. This includes debts incurred by sub-units of an organization other than the sub-unit which is applying to the PTFP, and includes debts owed to any agency of the Department of Commerce, not just the PTFP.

(e) An applicant whose proposal requires an authorization from the FCC must be eligible to receive such authorization.

(f) *Preliminary determination of eligibility.* In order to obtain a preliminary determination of applicant or proposal eligibility, a prospective applicant must send a letter requesting such determination to the Agency.

(1) The request letter should be addressed to: PTFP Director, NTIA/DOC, 14th and Constitution Avenue, NW., Room 4625, Washington, DC 20230.

(2) In the request letter the prospective applicant must:

(i) Describe the proposed project;

(ii) Include a copy of the organization's articles of incorporation and bylaws, or other similar documentation, which specifies the nature and powers of the prospective applicant (unless the prospective applicant has received a PTFP grant within the last ten (10) years, in which case only a copy of the most recent Annual Report or Quarterly Progress Report and any changes in the articles of incorporation and bylaws since the last grant must be provided); and,

(iii) If the prospective applicant is a nonprofit foundation, corporation, institution, or association which has not received a PTFP grant within the previous ten (10) years, provide a copy of a letter from the Internal Revenue Service granting the prospective applicant tax exempt status under section 501(c)(3) of the Internal Revenue Code, or other legal documentation of nonprofit status.

(3) A favorable preliminary determination of eligibility does not guarantee that the Agency will accept a future application for filing or award a subsequent grant.

(4) A prospective applicant may appeal an unfavorable preliminary determination of eligibility to the Administrator under § 2301.10.

§ 2301.5 Application procedures.

(a) *Address.* The following address should be used for all communications with the Agency: Public Telecommunications Facilities Program, NTIA/DOC, 14th and Constitution Avenue, NW., Room 4625, Washington, DC 20230.

(b) Application materials may be obtained from the address listed in paragraph (a) of the section.

(c) *Closing date.* The Administrator shall select and publish in the Federal Register a date by which applications for funding in a current fiscal year are to be filed.

(d) *New applications.* (1) All applications, whether mailed or hand delivered, must be received by the Agency at the address listed in paragraph (a) of this section at or before 5:00 p.m. by the closing date.

(2) A complete application must include an original and one copy of the Agency application form with the signature of an officer of the applicant, who is legally authorized to sign for the applicant, and all the information required by the Agency application materials, which shall include:

(i) A brief narrative statement (of not more than four (4) pages) describing the proposed project with particular attention to satisfying the funding criteria listed in §§ 2301.13 and 2301.14 of these rules;

(ii) If the applicant has not received a PTFP grant within the past ten (10) years, a copy of the applicant's articles of incorporation, by-laws, board of directors, and other similar documentation specifying the nature and powers of the applicant, except that state or local government entities need only provide a reference to the statutory or other authority under which they operate;

(iii) If the applicant is a nonprofit foundation, corporation, institution or association which has not received a PTFP grant within the previous ten (10) years, a copy of a letter from the Internal Revenue Service granting the applicant tax exempt status under section 501(c)(3) of the Internal Revenue Code, or other legal documentation of nonprofit status.

(iv) If the applicant received a PTFP grant within the previous ten (10) years, then it must reference the number of the previous grant, provide a copy of the most recent Annual Report or Quarterly Progress Report submitted to the PTFP, and submit a copy of any changes in the applicant's articles of incorporation or by-laws which have taken effect since the last grant was awarded;

(v) If the applicant applied for a preliminary determination of eligibility and received a positive determination, it may submit a copy of the official notification from the PTFP in lieu of the eligibility requirements of this section;

(vi) Documentation that the applicant will have, when needed, the funds to match any grant the Agency may provide;

(vii) Documentation that the applicant will have the funds necessary to operate and maintain those facilities once constructed.

(viii) Documentation of the amount of Federal and non-Federal financial support received by the applicant organization during each of the preceding three fiscal years or for the length of time the organization has been in existence if less than three years;

(ix) An opinion letter from the applicant's attorney stating that the applicant will have free simple title or a long-term lease (*e.g.*, a ten-year lease) or an option to obtain the same to any real or personal property necessary for the installation of major fixed equipment (such as a broadcast transmitter or tower);

(x) An inventory of all equipment (if any) currently owned by the applicant which corresponds to the type of equipment requested in the current application or which would be closely associated with the proposed project. The inventory should include manufacturers' names, model numbers, production years, and the dates of acquisition;

(xi) Within the narrative or as an optional exhibit no longer than two pages, a five-year plan outlining the applicant's projected facilities requirements and the projected costs of such requirements;

(xii) If special consideration is requested under § 2301.3, information detailing the basis for the request on the exhibit form provided by the Agency;

(xiii) Copies of letters transmitting a copy of the application to each of the entities required under § 2301.7;

(xiv) Significant documentation supporting the applicant's request for equipment, including as necessary the proper FCC authorization(s) cited in §§ 2301.8 and 2301.9, and if applicable, documentation indicating high incidence of repair or periods of inoperability;

(xv) Evidence that the applicant has participated (or, in the case of a planning grant, will participate) in comprehensive planning for the proposed project, including community involvement, an evaluation of alternate technologies and coordination with state telecommunications agencies, if any;

(xvi) Assurance that during the period in which the applicant possesses or uses the Federally funded facilities (whether or not this period extends beyond the Federal interest period), the applicant will not use or allow the use of the Federally funded equipment for essentially sectarian purposes;

(xvii) A detailed explanation of any complaints of discrimination currently pending or decided against the applicant before any court or governmental agency; and,

(xviii) A copy of any Environmental Impact Statement or other environmental assessment document prepared in conjunction with the proposed project as may be required by any Federal, state, or local law or regulation.

(xix) Assurance of compliance with all applicable Federal laws, rules or regulations relating to the project, as described on the application form provided by the Agency.

(e) *Deferred applicant.* (1) An applicant may reactivate an application deferred by the Agency during the prior year under § 2301.15, if the applicant has not substantially changed the stated purpose of the application.

(2) To reactivate a deferred application, the applicant must file the information described below, whether mailed or hand delivered, at or before 5:00 p.m. by the closing date.

(3) To file a complete reactivation request, the applicant must submit an original and one copy of the following:

(i) Sections I, II, and IV of Part I of the approved Agency application form with the original signature of an officer of the applicant, who is legally authorized to sign for the applicant, with a notation of the file number of the earlier application;

(ii) A brief narrative statement (not more than four (4) pages) describing the project proposed in the current application;

(iii) An update of availability of operating funds and the necessary non-Federal share of the project;

(iv) An update of the financial information required by paragraph (d)(2)(viii) of this section;

(v) A revised listing of current eligible project costs, if necessary;

(vi) A revised inventory as described in paragraph (d)(2)(x) of this section. Applicants having previously submitted an inventory need only submit updated information;

(vii) A revised five-year plan as described in paragraph (d)(2)(xi) of this section outlining the applicant's projected facilities requirements and the projected costs of such requirements;

(viii) If special consideration is requested under § 2301.3, current information detailing the basis for the request on the exhibit form provided by the Agency;

(ix) Copies of letters transmitting a copy of the current application to each of the entities required under § 2301.7;

(x) An updated explanation of any complaints of discrimination currently pending or decided against the applicant before any court or governmental agency; and,

(xi) Assurance of compliance with all applicable Federal laws, rules or regulations relating to the project, as described on the application form provided by the Agency.

(f) Deferred applications which are resubmitted under paragraph (e) of this section and contain substantial changes will be considered as new applications and must comply with the requirements of § 2301.5(d). All deferred applications may be subject to a second determination of eligibility.

(g) *Additional information.* (1) The Agency may request from the applicant any additional information which the Agency deems necessary or pertinent.

(2) Potential grant recipients may be subject to the following Department of Commerce Pre-Award Administrative Requirements and Policies:

(i) Name Check forms (Form CD-346) may be used to ascertain background information on key individuals associated with potential grantees. The Name Check requests information to determine if any key individuals in the organization have been convicted of, or are under indictment or have been charged with criminal offenses such as fraud, theft, perjury, or other matters pertinent to management honesty or financial integrity;

(ii) Potential grantee organizations may also be subject to reviews of Dun and Bradstreet data or other similar credit checks.

(3) Applicants must promptly provide any additional information which the Agency requests as being necessary or pertinent.

§ 2301.6 Amendments to applications.

(a) An applicant which has filed a timely and complete application or a request seeking reactivation of a deferred application may submit minor changes to its application or submit additional information at any time up to 45 calendar days after the closing date.

(b) To make minor changes to its application, an applicant must submit an original and one copy of the following to the address listed in § 2301.5(a):

(1) A letter describing in detail the information or documentation which the applicant is changing or adding to its application;

(2) Any new material or altered material; and,

(3) A certification that it has filed a copy of the change(s) with each of the entities required under § 2301.7.

(c) Applicants may not submit substantial amendments to their applications after the closing date. Substantial amendments are any which change the applicant or substantially alter the nature or scope of the proposed project.

§ 2301.7 Service of applications.

(a) On or before the closing date all new or deferred applicants must serve a copy of the application on the following agencies:

(1) In the case of an application for a construction grant for which FCC authorization is necessary, the Secretary, Federal Communications Commission, 1919 M Street, NW., Washington, DC 20554;

(2) The state or local agency(-ies), if any, having jurisdiction over the development of broadcast and/or nonbroadcast telecommunications in the state(s) and the community(-ies) to be served by the proposed project; and,

(3) The state office established to review applications under Executive Order 12372 as amended by Executive Order 12416, if the state has established such an office and wishes to review these applications.

(b) Those amending applications under § 2301.6 must serve a copy of the amendment on all relevant agencies as listed in paragraph (a) of this section.

§ 2301.8 Federal Communications Commission authorization.

(a) Each applicant whose project requires FCC authorization must file an application for that authorization on or before the closing date. Recommended submission date for applications to the FCC is at least 60 days prior to the closing date. The applicant should clearly identify itself as a PTFP applicant.

(b) Any FCC authorization required for the project must be in the name of the applicant for the PTFP grant.

(c) If the project is to be associated with an existing station, FCC operating authority for that station must be current and valid.

(d) For any project requiring new authorization(s) from the FCC, the applicant must file a copy of each FCC application and any amendments with the Agency.

(e) If the applicant fails to file the required FCC application(s) by the closing date, or if the FCC returns, dismisses, or denies an application required for the project or any part thereof, or for the operation of the station with which the project is associated, the Agency may return the application.

(f) No grant will be awarded until confirmation has been received from the FCC that any necessary authorization will be issued.

§ 2301.9 Acceptance for filing.

After the closing date, the Agency will examine each application for timeliness, completeness, eligibility, and FCC authorization.

(a) The Agency will publish a notice in the FEDERAL REGISTER listing all applications accepted for filing. Acceptance of an application for filing does not preclude subsequent return or disapproval of the application, nor does it assure that the application will be funded. Publication merely operates to qualify the application to compete for funding with other applications accepted for filing.

(b) The notice of acceptance for filing will also include a request for comments on the applications from any interested party. The procedural requirements of § 2301.11 will be set forth in the notice.

(c) Incomplete applications will be returned by the Agency.

(d) Any application, substantial amendment to an application, or request to reactivate a deferred application which is filed after the closing date will be returned by the Agency.

(e) When the Agency finds that either the applicant or the project is ineligible under the Act and/or these Rules, it will return the application and inform the applicant of the denial of eligibility.

(f) If the Agency finds that a proposed project requires authorization from the FCC and that the applicant did not tender its application for such authorization, the Agency will return the application.

§ 2301.10 Appeals.

(a) Within 15 calendar days after the date on which the Agency sends a written notice to an applicant denying the eligibility of the applicant or the proposed project, or notifying an applicant that its application is incomplete, the applicant may file a written notice of appeal with the Administrator at the address listed in § 2301.5(a). Applicants may not appeal the return of applications filed after the closing date.

(b) The notice of appeal must show that the denial of eligibility or determination of incompleteness is factually or legally incorrect. If the applicant relies on any written documents or other materials to dispute the Agency's action, the applicant should list and attach a copy of each item or indicate that the Agency has a copy of the item in its possession.

(c) Upon receipt of the notice of appeal, the Administrator will review the appeal in consultation with the Chief Counsel and the PTFP Director and will render a written decision within 30 calendar days.

(d) If the Administrator sustains the denial of eligibility or the determination of incompleteness, the Agency will return the application to the applicant.

(e) All decisions of the Administrator made under paragraph (c) of this section are final.

§ 2301.11 Public comments.

(a) Any interested party may file comments with the Agency supporting or opposing an application and setting forth the grounds for support or opposition. Such comments must contain a certification that a copy of the comments has been delivered to the applicant. Comments must be sent to the address listed in § 2301.5(a).

(b) The Agency will incorporate all comments from the public and any replies from the applicant in the applicant's official file.

§ 2301.12 Coordination with interested agencies and organizations.

In acting on applications and carrying out other responsibilities under the Act, the Agency shall consult with:

(a) The FCC, with respect to functions which are of interest to, or affect other functions of the FCC;

(b) The Corporation for Public Broadcasting, public broadcasting agencies, organizations, other agencies, and institutions administering programs which may be coordinated effectively with Federal assistance provided under the Act; and,

(c) The state office established to review applications under Executive Order 12372 as amended by Executive Order 12416, if the state has established such an office and wishes to review these applications.

§ 2301.13 Funding criteria for construction applications.

In determining whether to approve or defer a construction grant application, in whole or in part, and the amount of such grant, the Agency will evaluate all the information in the application file and consider, in no order of priority, the following factors:

(a) The extent to which the project meets the program purposes set forth in § 2301.2 as well as the specific program priorities set forth in the Appendix of these rules;

(b) The adequacy and continuity of financial resources for long-term operational support;

(c) The extent to which non-Federal funds will be used to meet the total cost of the project;

(d) The extent to which the applicant has:

(1) Assessed specific educational, informational, and cultural needs of the community(-ies) to be served, and the extent to which the proposed service will not duplicate service already available;

(2) Evaluated alternative technologies and the bases upon which the technology was selected;

(3) Provided significant documentation of its equipment requirements, and the urgency of acquisition or replacement;

(4) Provided documentation of an increasing pattern of substantial non-Federal financial support;

(5) Provided other evidence of community support, such as letters from elected or appointed policy-making of-

ficials, and from agencies for whom the applicant produces or will produce programs or other materials;

(e) The extent to which the evidence supplied in the application reasonably assures an increase in public telecommunications services and facilities available to, operated by, and owned or controlled by minorities and women;

(f) The extent to which various items of eligible apparatus proposed are necessary to, and capable of, achieving the objectives of the project and will permit the most efficient use of the grant funds;

(g) The extent to which the eligible equipment requested meets current broadcast industry performance standards;

(h) The extent to which the applicant will have available sufficient qualified staff to operate and maintain the facility and provide services of professional quality;

(i) The extent to which the applicant has planned and coordinated the proposed services with other telecommunications entities in the service area;

(j) The extent to which the project implements local, statewide or regional public telecommunications systems plans, if any; and,

(k) The readiness of the FCC to grant any necessary authorization.

§ 2301.14 Funding criteria for planning applications.

In determining whether to approve or defer a planning grant application, in whole or in part, and the amount of such grant, the Agency will evaluate all the information in the application file and consider, in no order of priority, the following factors:

(a) The extent to which the applicant's interests and purposes are consistent with the purposes of the Act and the priorities of the Agency;

(b) The qualifications of the proposed project planner;

(c) The extent to which the project's proposed procedural design assures that the applicant would adequately:

(1) Obtain financial, human and support resources necessary to conduct the plan;

(2) Coordinate with other telecommunications entities at the local, state, regional and national levels;

(3) Evaluate alternative technologies and existing services; and

(4) Receive participation by the public to be served (and by minorities and women in particular) in the project planning;

(d) Any pre-planning studies conducted by the applicant showing the technical feasibility of the proposed planning project (such as the availability of a frequency assignment, if necessary, for the project); and,

(e) The feasibility of the proposed procedure and timetable for achieving the expected results.

§ 2301.15 Action on all applications.

(a) After consideration of an application which the Agency has accepted for filing, any comments filed by interested parties and replies thereto, and any other relevant information, the Agency will take one of the following actions:

(1) Select the application for funding, in whole or in part;

(2) Defer the application for subsequent consideration; or,

(3) Return the application as ineligible pursuant to § 2301.9 with a notice of the grounds and reasons.

(b) Upon the approval or deferral, in whole or in part, of an application, the Agency will inform:

(1) The applicant;

(2) Each state educational television, radio, or telecommunications agency, if any, in any state any part of which lies within the service area of the applicant's facility;

(3) The FCC; and,

(4) The Corporation for Public Broadcasting and, as appropriate, other public telecommunications entities.

(c) If the Agency decides to fund an application, the award documents will include grant terms and conditions and whatever other provisions are required by Federal law or regulations, or which may be deemed necessary or desirable for the achievement of program purposes.

(d) An applicant or an objecting party may not appeal to the Administrator the Agency's determination to fund or not fund a particular application.

(e) Information about grant terms and conditions or other applicable laws and regulations is available from PTFP at the address listed in § 2301.5(a).

Subpart C—Federal Financial Participation

§ 2301.16 Amount of the Federal grant.

(a) *Construction grants.* (1) A Federal grant for the construction of a public telecommunications facility shall be in an amount determined by the Agency and set forth in the award document. Such amount may not exceed seventy-five (75) percent of the amount determined by the Agency to be the reasonable and necessary cost of such project.

(2) No part of the grantee's matching share of the eligible project costs may be met with funds paid by the Federal government, except where the use of such funds to meet a Federal matching requirement is specifically and expressly authorized by the relevant Federal statute.

(3) After the filing of its application, the applicant may, at its own risk, obligate non-Federal matching funds for the acquisition of proposed equipment. Should the applicant exceed the non-Federal share as established in the final award agreement, the Federal share of the total project cost will be reduced by a corresponding amount.

(4) Funds supplied to an applicant by the Corporation for Public Broadcasting may not be used for the required non-Federal matching purposes, except upon a clear compelling showing of need.

(b) *Planning grants.* A Federal grant for the planning of a public telecommunications facility shall be in an amount determined by the Agency and set forth in the award document and the attachments thereto. The Agency may provide up to one hundred (100) percent of the funds necessary for the planning of a public telecommunications construction project. 5

(c) Project costs do not include the value of eligible apparatus owned or acquired by the applicant prior to the closing date.

§ 2301.17 Items and costs ineligible for Federal funding.

The following items and costs are ineligible for funding under the Act:

(a) *Equipment and supplies.* Each year, the Agency will review its list of ineligible equipment and supplies. A copy of the currently applicable list of ineligible equipment will be provided with every application package for PTFP grants.

(b) *Other expenses ineligible for funding.* (1) Buildings and modifications to buildings to house eligible equipment and fences surrounding them are not themselves eligible for funding under this program, except that small equipment shelters which are part of satellite earth stations, translators, microwave interconnection facilities, and similar facilities are eligible for funding;

(2) Land and land improvements;

(3) Salaries of personnel employed by an operating public telecommunications entity and other operational costs (except for planning projects under section 392(c) of the Act);

(4) Moving costs required by relocations;

(5) Such other expenses as the Agency may determine prior to the award of a grant.

§ 2301.18 Waiver.

For good cause shown, the Administrator may waive the regulations adopted pursuant to section 392(e) of the Act.

Subparts D–F—[Reserved]

APPENDIX TO PART 2301—PRIORITIES

Priority I—Provision of Public Telecommunications Facilities for First Radio and Television Signals to a Geographic Area

Within this category, NTIA establishes two subcategories:

A. *Projects which include local origination capacity.* This subcategory includes the planning or construction of new facilities which can provide a full range of radio and/or television programs including material that is locally produced. Eligible projects include new radio or television broadcast stations, new cable systems, or first public telecommunications service to existing cable systems, provided that such projects include local origination capacity.

B. *Projects which do not include local origination capacity.* This subcategory includes projects such as increases in tower height and/or power of existing stations and construction of translators, cable networks and repeater transmitters which will result in providing public telecommunications services to previously unserved areas.

Priority I and its subcategories only apply to grant applicants proposing to plan or construct new facilities to bring public telecommunications services to geographic areas which are presently unserved, *i.e.*, areas which do not receive any public telecommunications services whatsoever. (It should be noted that television and radio are considered separately for the purposes of determining coverage.)

Under Priority IB, NTIA will consider an area served when it receives a public television signal from a distant source through a cable system which has a penetration rate of fifty (50) percent. (An applicant proposing to plan or construct a facility to serve a geographical area which is presently unserved, should indicate the number of persons who would receive a first public telecommunications signal as a result of the proposed project.)

Priority II—Replacement of Basic Equipment of Existing Essential Broadcast Stations

Projects eligible for consideration under this category include the replacement of obsolete or worn out equipment in existing broadcast stations which provide either the only public telecommunications signal or the only locally originated public telecommunications signal to a geographical area.

In order to show that the replacement of equipment is necessary, applicants must provide documentation indicating excessive downtime, or a high incidence of repair (*i.e.*, copies of repair records, or letters documenting non-availability of parts.) Additionally, applicants must show that the station is the only public telecommunications station providing a signal to a geographical area or the only station with local origination capacity in a geographical area.

The distinction between Priority II and Priority IV is that Priority II is for the replacement of basic equipment for essential stations. Where an applicant seeks to "improve" basic equipment in its station (*i.e.*, where the equipment is not "worn out"), or where the applicant is not an essential station, NTIA would consider the applicant's project under Priority IV.

Priority III—Establishment of a First Local Origination Capacity in a Geographical Area

Projects in this category include the planning or construction of facilities to bring the first local origination capacity to an area already receiving public telecommunications services from distant sources through translators, repeaters or cable systems.

Applicants seeking funds to bring the first local origination capacity to an area already receiving some public telecommunications services may do so, either by establishing a new (and additional) public telecommunications facility, or by adding local origination capacity to an existing facility. (A source of a public telecommunications signal is distant when the geographical area to which the source is brought is beyond the grade B contour of the origination facility.)

Priority IV—Replacement and Improvement of Basic Equipment for Existing Broadcast Stations

Projects eligible for consideration under this category include the replacement of obsolete or worn out equipment and the upgrading of existing origination or delivery capacity to current industry performance standards (*e.g.*, improvements to signal quality, and significant improvements in equipment flexibility or reliability). As under Priority II, applicants seeking to replace or improve basic equipment under Priority IV should show that the replacement of the equipment is necessary by including in their applications data indicating excessive downtime, or a high incidence of repair (such as documented in repair records).

Priority V—Augmentation of Existing Broadcast Stations

Projects in this category would equip an existing station beyond a basic capacity to broadcast programming from distant sources and to originate local programming.

A. *Projects to equip auxiliary studios at remote locations, or to provide mobile origination facilities.* An applicant must demonstrate that significant expansion in public participation in programming will result. This subcategory includes mobile units, neighborhood production studios or facilities in other locations within a station's service area which would make participation in local programming accessible to additional segments of the population.

B. *Projects to augment production capacity beyond basic level in order to provide programming or related materials for other than local distribution.* This subcategory would provide equipment for the production of programming for regional or national use. Need beyond existing capacity must be justified.

Special Applications.—NTIA possesses the discretionary authority to award grants to eligible applicants whose proposals are so unique or innovative that they do not clearly fall within the listed priorities. Innovative projects submitted under this category must address demonstrated and substantial community needs (*e.g.*, service to identifiable ethnic or linguistic minority audiences, services to the blind or deaf, instructional services or electronic text).

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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Material Approved for Incorporation by Reference

The Director of the Federal Register has approved under 5 U.S.C. 552(a) and 1 CFR Part 51 the incorporation by reference of the following publications. This list contains only those incorporations by reference effective as of the revision date of this volume. Incorporations by reference found within a regulation are effective upon the effective date of that regulation. For more information on incorporation by reference, see the preliminary pages of this volume.

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ASTM F589–85 Standard Consumer Safety Specification for Non-Powder Guns (June 28, 1985).	1150.1
General Services Administration Office of Engineering and Technical Management Chemical Technology Division, Paints Branch, Washington, DC 20406	
Federal Standard 595a, February 1967, Color No. 12199	1150.3

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